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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 476

GOLDIE B. PRASHKER, Executrix of the Estate of Nathan Prashker, deceased, and CHOICE EMBROIDERY & LACES, INC.,

*Petitioners,*

v.

BEECH AIRCRAFT CORPORATION and ATLANTIC AVIATION CORPORATION,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

BEECH AIRCRAFT CORPORATION and ATLANTIC AVIATION CORPORATION,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Goldie B. Prashker, Executrix of the Estate of Nathan Prashker, deceased, and Choice Embroidery & Laces, Inc., respectfully petition that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 21, 1958, and the order of said court denying rehearing entered on August 8, 1958.

## Opinions Below

The opinion of the District Court for the District of Delaware is not reported. It is printed in the appendix to appellants' brief, below, at pages 295a-299a. The opinion of the Court of Appeals for the Third Circuit has not yet been reported. It is printed in the appendix hereto, *infra;* pages 1a-13a.

## Jurisdiction

The judgment of the Court of Appeals was entered July 21, 1958 (*infra,* p. 14a). The order denying rehearing was entered on August 8, 1958 (*infra,* p. 14a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## Questions Presented

1. Forty-five Beechcraft Bonanza airplanes disintegrated in the air in the same manner and for the same reasons as the Prashker airplane, killing all occupants in each instance. The Bonanza's rate of structural failure, as compared with all other single-engine civil airplanes, was a startling 15 to 1.

   A. Was it not strange and alarming error for the court below to affirm the exclusion of this evidence? And was it not a mystifying failure to apply local law?

   B. Are the estates and dependents of pilots killed in these accidents to be denied their right to jury trial by the device of holding other accidents "irrelevant"?

   C. Can the opinion of a leading aerodynamicist that the accidents demonstrate the improper design and dangerous characteristics of the airplane be disregarded, as a matter of law, by the court below?

2. Was not the direction of a verdict on the "alternative" grounds of contributory negligence as a matter of law and failure to prove negligence a shocking denial of petitioners' constitutional right to trial by jury that warrants the exercise of this court's supervisory powers?

3. Is the manufacturer of an airplane insulated from liability for its failure to give necessary warnings and for its negligent design by approval and certification of that airplane by a federal agency?

## Constitutional Provision Involved

Constitution of the United States, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

## Statement of the Case

There are approximately 5,000 Beechcraft Bonanza airplanes registered. About one out of every sixty manufactured has come apart in the air, killing all occupants (one to four people in each case).[1] According to petitioners' proof, which was largely confined to the Prashker accident and the forty-five instances that preceded it, these accidents were caused by the airplane's unique and dangerous combination of flying characteristics (or "handling qualities") which, under certain conditions, disorient a pilot, make him sick, lead him to lose control of his airplane, and through the force that he exerts on his "stick" or rudder control, lead him to impose huge loads on the

[1] As of December 31, 1957 seventy-nine Bonanzas had come apart in flight.

wings which cause structural failure. The accidents have involved pilots of all degrees of experience.

Statistically, petitioners discovered and tried to prove that the Bonanza suffers structural failure in flight at a rate fifteen times the rate of all other single-engine civil aircraft.[2] A comparison between the number of Bonanza structural failure accidents and the number of all others indicates that for all practical purposes the Bonanza, which is the only airplane certificated to make use of the unique "V" tail, is the only type or model airplane that has come apart with anything more than isolated frequency.

Despite the obvious and frightening danger in the airplane, the Bonanza, at least through the time of the Prashker accident, continued to be manufactured with the same design defects and without significant corrective changes.

The Bonanza conforms to the standards of the Civil Air Regulations, promulgated by the Civil Aeronautics Board (14 C.F.R. Part 3). It has been and is certificated and approved by the Civil Aeronautics Administration, largely because it conforms with the standards of the Regulations (23c-26c).[3]

Despite Civil Aeronautics Administration approval, the respondent Beech, saw fit, in 1947 and 1948, to warn Bonanza users of the structural failure in flight possibility in Bonanzas. Detailed accident reports, sometimes in hair-raising language were sent out to all Bonanza users (PX 64-65, 341a-364a, 320a-323a). This policy, although itself inadequate to meet the danger, was discontinued in October, 1948, largely because of the pressure from dis-

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[2] This rate is based on a simple comparison of the number of structural failure accidents with the number of aircraft registered for a six-year period through the year of the Prashker accident, and year by year through that period. The court below, while ruling this evidence inadmissible, admitted it was "startling."

[3] References are to the appendices to the briefs below, unless otherwise indicated.

tributors and salesmen (320a, 321a, 323a). Nathan Prashker, the deceased pilot in this case, had not been given these warning letters, and had not been told about any of the forty-five accidents that preceded his (17a).

This action arises out of the 46th almost identical instance of structural failure in flight of a Bonanza. It involved Bonanza N-2168D, which was being flown by Nathan Prashker and was owned by Choice Embroidery & Laces, Inc. This action was brought by Prashker's estate and Choice, for wrongful death, survival, punitive, and property damages against the respondents, the manufacturer and distributor of the airplane. It is based both on negligence and breach of warranty.

**Petitioners' Claims**

Petitioners sought to prove that the Bonanza had an oscillation characteristic (sometimes called a "fishtailing" or "weaving") in air with any degree of turbulence. The oscillation was of a unique type—creating accelerations (rates of changes of speed) which would disorient a pilot and make him physically ill. Coupled with this oscillation-acceleration characteristic was the second major factor—an extremely rapid rate of speed build-up in a nose-down attitude. Thus if the nose, or front of the airplane, tips down (itself a result of the oscillations) the airplane picks up speed very rapidly. Finally, at the high speeds which this plane would attain, a light touch on the stick would create huge loads on the structure, tearing it apart. As indicated, it was the *combination* of these characteristics which, in their interaction, made the Bonanza peculiarly subject to disintegration in flight.

Petitioners claimed that respondents had failed to give warning of the great danger in the airplane; indeed that they had failed to give warning, required by the circumstances of the large number and high rate of prior acci-

dents. They claimed dissemination of false information about the airplane—that it was safe from a structural standpoint, when, in fact, it was known by respondents to be especially dangerous. In addition, they claimed negligent design, as indicated above, and, more important, a failure to correct the bad design, or add safety devices such as dive brakes, when the airplane was known to be unsafe.

The principal basis for petitioners' claims was evidence of the prior accidents and statistical comparison of failure mentioned above. Aside from being the most important proof of notice to Beech, it was the basis for expert testimony that the cause of the Prashker accident lay in the characteristics of the Bonanza. Petitioners' expert witness, Dommasch,* in testimony later stricken because it was based in part on prior accidents which had been excluded, testified that the explanation of these accidents lies "in the characteristics of the airplane which can induce it to, let us say, disorient a pilot, and also to bring its nose down rather rapidly without his awareness of this situation" (235a). Again, "that the peculiar handling qualities of this airplaine • • •" would cause "• • • the nose to drop out and the pilot to become disoriented. And under these conditions there is very little else he could do at low altitude but pull the wings off when he recognized his plight" (236a, 237a).

* Daniel O. Dommasch is one of the world's leading aerodynamicists. He is chief of three authors of "Airplane Aerodynamics," which is the standard work on aerodynamics in aeronautical schools today, and he is the author of three other books in the field of aeronautics. He set up the flight test program for the N.A.T.O. nations. He organized and established the curriculum of the Navy's test pilot training division at Patuxent. He is former engineering coordinator (on a level with chief engineers of Bell Aircraft Company, former project engineer of the Civil Aeronautics Administration, former professor at Princeton University in aeronautical engineering, and he has been a consultant to many leading aeronautical companies (137a-143a, 145a-146a, 233a).

The District Court refused to admit any accident reports or statistics, on the issue of causation, and admitted only seven reports on the limited issue of notice. The Court of Appeals affirmed the exclusion of this evidence on the unbelievable ground that it was "irrelevant."

## The Accident

The accident herein occurred on October 5, 1953, only seventeen minutes after Prashker took off from Allegheny County Airport (south of Pittsburgh) on a 42 minute flight, northwest, to Cleveland (62a, 76a, 301a, 308a). Although the takeoff was in a northwest direction, the crash was eight miles *southeast* (62a, 76a).

The takeoff was normal. Prashker was seen flying about three miles northwest (310a). He was not seen nor heard from until eleven minutes later, at which time he called the Allegheny tower to say "he was over the city at 2300 feet, *unable to maintain VFR*,[5] and was going to climb" (308a). It was conceded by the court below to be inferrable that prior to making this radio call Prashker had turned around from his course to Cleveland to avoid worsening weather condition ahead (opinion, *infra*, p. 6a), and that he was trying to return to Allegheny County Airport (310a, 311a).

Within four minutes, ground witnesses at the scene of the crash "saw a wing fall off an airplane" and saw the plane crash to the ground (63a, 76a, 312a). There is no

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[5] The "City" referred to Pittsburgh, and "2300 feet" referred to the height above sea level, shown on Prashker's altimeter, as distinguished from height above the ground. The Civil Air Regulations (PX 25) prevent flight at less than one thousand feet over a City or populated area. "VFR" refers to Visual Flight Rules, specified in those regulations, said flight to be conducted by visual reference to the ground, objects or clouds (42a, 44a) as distinguished from reference to instruments.

question but that in that four minute period Prashker became anxious and excited, that he was disoriented and lost, that he lost control of the airplane and imposed loads on its structure that it could not withstand. This was asserted by petitioners as the result of the unique and dangerous flying characteristics of the plane. Petitioners tried to prove that on the 45 prior occasions pilots with all degrees of experience, ranging from novices to experienced instrument pilots with a perfect right and all the necessary qualifications to fly in instrument weather, had lost control, and, like Prashker, had pulled their airplanes apart in precisely the same way he had.[6]

The Civil Air Regulations prescribe certain conditions of ceiling and visibility without which a non-instrument pilot may not fly (14 C.F.R. 60.30, 60.31, PX 25). They also provide that in emergency situations the pilot is free to disregard regulations and act in the interest of immediate safety (14 C.F.R. 60.2, PX 25).

When Prashker took off from Allegheny the weather there was indisputably well above VFR requirements (41a, 304a). Furthermore, the reported weather at Greater Pittsburgh Airport, along the way, and at Cleveland, his destination, which was the only weather information available to Prashker, showed substantial and increasing improvement along the route. (63a, 64a, 294a, 304a, 314a).[7]

There was no specific evidence as to whether Prashker had actually checked the weather prior to his departure, but this was inferrable from the fact that he filed a VFR flight plan, demonstrating his belief that the weather along

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[6] Eleven of the 45 pilots were qualified instrument pilots (See accident reports, 260a-261a, PX 52).

[7] The District Court refused to admit evidence of the reported Cleveland weather. The court below recites this evidence, however, as though it were admitted (Opinion; *infra*, p. 2a).

the route met VFR requirements (301a, 307a-308a). There was also evidence that it was Prashker's regular practice to check the weather (11a).

Prashker concededly had no instrument rating (8a). He did have considerable instrument training, however (9a, 11a, PX. 3). He was described by his brother, also a pilot, as "a very capable pilot, a very safe pilot" (8a). He knew the dangers of flying in bad weather (17a) and his training was such as would help him avoid bad weather if that were possible (18a).

## Rulings of the Courts Below

At the close of the plaintiffs' case, the District Court directed a verdict for the respondents (a) in the claims based on negligence, on the ground that the deceased pilot was guilty of contributory negligence as a matter of law, (b) in the claim for breach of warranty against the distributor, on the ground that decedent's negligence bars a recovery, (c) in the claim for breach of warranty against the manufacturer, on the basis of lack of privity under Kansas law, and (d) in the claim against the manufacturer for punitive damages on the ground that there was insufficient evidence.

On appeal by the petitioners to the Court of Appeals, that Court affirmed, but on somewhat different grounds. While stating that the petitioners' position, on the question of contributory negligence, was "arguable", it relied "also on an alternative ground for decision", that the plaintiffs failed to prove negligence and breach of warranty. As indicated, the court affirmed the exclusion of evidence of other accidents and the comparative rate of failure on the ground of "irrelevancy".

## REASONS FOR GRANTING THE WRIT

### 1. Holding the prior Bonanza disintegration accidents and the Bonanza's disparate rate of failure "irrelevant" was gross and shocking error, a violation of local law, in conflict with other decisions of the court below, and a deprivation of jury trial.

#### As to Prior Accidents

The court below has decided, as a matter of law, that the prior accidents were caused by pilot fault, and that, therefore, they were "irrelevant" to the issue of whether the Bonanza was unsafe, and whether its characteristics caused the Prashker accident (Opinion, *infra*, p. 11a). This finding is in direct contradiction to the petitioners' expert proof that the accidents were not caused by pilot fault, but rather by the characteristics of the airplane. (See Dommasch testimony, quoted *supra*, p. 6). The court below has, in effect, set itself up as a super-engineer who can read aircraft accident reports with eyes more skilled than those of a leading expert in the field.

The court has concluded that no inferences whatever may be drawn from the fact that an airplane comes apart in the air "because of the compromise required with structural strength in designing an aircraft which will get off the ground" (Opinion, *infra*, p. 11a). It has not only ignored common sense, but has ignored the direct testimony to the contrary of a man whose life's work has been devoted to aircraft design (See Dommasch testimony, 272a; and transcript, pp. 1887 and 1952).

The finding of the court below that the accidents were "irrelevant" defies understanding. Instances of structural failure in flight in Bonanzas are obviously relevant to the Prashker instance of structural failure in flight in a Bonanza, particularly when an expert specifically says

so, (235a, 251a, 271a).. True, respondents may attempt to explain these instances and distinguish them from the Prashker accident. But a court may not hold that they are "irrelevant" as a matter of law.

Indeed, these reports of other accidents were more than relevant to the issue of causation. They were necessary! Asked "what material do you as an engineer require to analyze the Prashker accident and come to a conclusion on the cause of the Prashker accident," Mr. Dommasch replied "a study of similar circumstances of similar occurrences if they exist" (170a). He added, "this is an essential ingredient to my analysis of the Prashker accident" (171a).

The District Court refused to admit any of the accident reports on the issue of dangerous condition and causation. Since this was essential evidence its exclusion effectively prevented petitioners from introducing specific expert proof on causation. This determination by the District Court, along with the exclusion of all other related evidence on the ground of "irrelevancy," was affirmed by the court below.* It was in stark violation of the law of Pennsylvania where the accident happened, the law of Delaware, where the case was tried, and other decisions of the Court of Appeals.

In *Fisher* v. *Pomeroy's, Inc.*, 322 Pa. 389, 185 A. 296 (1936), and *Baker* v. *Hagey*, 177 Pa. 128, 139, 140, 35 A. 705 (1896), the Supreme Court of Pennsylvania clearly

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* The court below went even further, and impliedly held that even the admission of evidence of seven accidents, on the limited issue of notice, was not warranted. This was in direct contradiction to the Court's holding, in *DeEugenio* v. *Allis-Chalmers Mfg. Co.*, 210 F. 2d 409, 414 (C. A. 3, 1954), citing *Baltimore & Ohio R. R.* v. *Felgenhauer*, 168 F. 2d 12, 17 (C. A. 8, 1948), and was contrary to clear Pennsylvania Law. *Muller* v. *Kirschbaum Co.*, 298 Pa. 560, 148 A. 851 (1930); *Schok* v. *Pennsylvania Edison Co.*, 331 Pa. 524, 1 A. 2d 680 (1938); and *Reid* v. *Lintz*, 206 Pa. 109, 55 A. 849 (1903).

held that evidence of prior occurrences was relevant and admissible on the issues of the existence of a dangerous condition, and causation.

*Potter* v. *Natural Gas Company*, 183 Pa. 575, 590, 39 A. 7 (1898), to the same effect, has striking significance to the question at bar. *One* prior instance, in which a pipe laid by defendant at the side of a highway had, through a scraping sound made by the wheel of a cart passing over it, frightened a horse and caused him to jump, was held admissible. The court said it was relevant to determine whether the pipe, in its position on the road, was dangerous to travelers by horse and vehicle; that if it excited fear in an ordinarily gentle horse, it was part of plaintiff's case to prove it; that if the plaintiff's horse in the case then at bar had jumped only because it was exceptionally excitable, the defendant was not bound to foresee the danger and guard against it.

In the instant case petitioners were obliged to show that the accident was caused by the dangerous characteristics of the Bonanza airplane, rather than by any improper conduct on the part of Prashker. The proof of the prior accidents, which involved pilots of all degrees of experience, including pilots with air transport ratings, instrument ratings, and commercial licenses, was clear demonstration that the Prashker accident, as well as the others, was caused by the airplane rather than the pilot.

In *Patton* v. *B. & O. R.R. Co.*, 197 F. 2d 732, 739 (C. A. 3, 1952), the plaintiff's decedent had been killed by four runaway gondola cars. The case was based upon negligence in maintenance of brakes on the defendant's cars. Employees of the railroad yard where the accident had taken place testified to prior incidents where handbrakes on B. & O. cars proved inadequate, and wouldn't hold. The court, which was the same court, though a different panel of judges as the court below, held that this was not error despite the fact that the particular four cars involved in the accident were not singled out.

In *Hadley* v. *B. & O. R. Co.*, 120 F. 2d 993, 995 (C. A. 3, 1941), cited in the *Patton* case, the Court said, at page 995:

> "Furthermore the testimony qualified as relevant and material under the general rule that 'the fact that a given result recurs continually and frequently while but one cause remains constant, is *strong* proof that such cause produces the result in question * * *'. *Henry Pennsylvania Trial Evidence, 3rd Ed. 33.*"

In *Dimenco* v. *Pennsylvania Railroad Co.*, 19 F.R.D. 499 (D. Del., 1956), Chief Judge Leahy stated (p. 501):

> "A survey of authority indicates evidence of other accidents and near accidents admissible to show dangerous character and notice provided the nature of the subject matter is in issue and provided substantially similar conditions establish its probative value."

At page 503, he said:

> "I therefore find evidence of prior accidents and near accidents relevant and material and therefore admissible under proper instructions, not as direct evidence of the fact of negligence, but to show the dangerous character of the crossing, notice to the defendant, and failure thereafter to take proper precautions; evidence of subsequent accidents and near accidents, though not logically determinative of notice of a prior condition, may be admissible to show existence of dangerous character and failure to take proper precautions."

**As to Statistics**

The court below affirmed the exclusion of the statistical proof in very sweeping terms. It stated (Opinion, *infra*, p. 12a):

> "As to the issue of causation by a design defect, the statistic tends to prove nothing more than the

individual accident reports. It is extremely dubious, in fact, whether statistics involving probabilities as to causation have any significance at all when applied to a particular incident."

If the court is correct, one wonders how such uniformly accepted "statistical" evidence as expectancy of life tables are admitted. Actually, petitioners' "statistics" were very simple. They consisted of CAA and CAB information on the number of airplanes registered and the number of structural failure accidents. The Bonanza's rate of failure was 15 times the rate for all other airplanes, by a simple comparison.

In *Wright* v. *Carter Products Inc.*, 244 F. 2d 53, 56, 57 (C. A. 2, 1957), a recent manufacturer's liability case involving the duty to warn, the defendant sought to establish the safety of its product, by a statistical analysis of the incidence of injury. The District Court relied very heavily upon the small incidence in finding in favor of the defendant. The Court of Appeals, in reversing the District Court inferentially acknowledged that the statistic had probative force, although not the force given to it by the lower court.

In affirming the exclusion of the statistical proof, the court below applied an incomprehensible logic. The court has said that since the statistics are based in part upon Bonanza accidents which are irrelevant (since, as a matter of law, the accidents were caused by pilot fallibility) the statistics are also irrelevant. The court itself admits the statistic is "startling" (*infra*, p. 12a).

The statistics show that for any and all reasons the Bonanza comes apart more than fifteen times as often as all other aircraft. They consider *all instances of structural failure in flight in single-engine civil airplanes.* Their effect is to eliminate extraneous and contributing factors of causation, such as pilot fault, and to evaluate the rela-

tive safety of the Bonanza. The statistics demonstrate the *falsity* of the assumption made by the court below—that the Bonanza accidents were caused by pilot fault. In a sense, the statistics provide further proof that the particular accident reports were admissible on the issue of dangerous condition and causation.

This evidence was probative of the questions of negligence, causation, and contributory negligence, since it demonstrated that it was the airplane and not the pilots that *caused* these accidents; and since it furnished the basis for expert proof to the same effect. The effect of its shocking exclusion was to deny petitioners their constitutional right to trial by jury.

## 2. The direction of a verdict on the "alternative" grounds of contributory negligence as a matter of law and failure to prove negligence was a shocking invasion of the jury's function, a denial of petitioners' right to jury trial, and in conflict with standards well settled by this Court.

Even without the important evidence of the other accidents, petitioners were clearly entitled to go to the jury in their claims of negligence and breach of warranty. This right has been denied them on the "alternative" grounds that (1) the decedent was guilty of contributory negligence as a matter of law, and (2) "no negligence can be imputed to the defendants" (Opinion, *infra*, p. 7a).

### a. Contributory Negligence as a Matter of Law

It is not entirely clear whether the court below did or did not base its decision on contributory negligence. The court said, *infra*, p. 7a:

> "A decision based on Prashker's contributory negligence alone would depend on a preliminary holding that the evidence would not support an inference that

> bad weather may have closed in on him even though he was exercising due care for his own safety. We incline to the view that no such inference is available, but concede that the question may be arguable. Therefore * * * we prefer to rely also on an alternative ground for decision. We think that no negligence can be imputed to the defendants."

How can the question of contributory negligence be "arguable", and still not be left for the jury? In *Schulz v. Pennsylvania Railroad Company,* 350 U. S. 523, 76 S. Ct. 608 (1956), this court, citing the Seventh Amendment's *guarantee* of the right to trial by jury, and having "granted certiorari to consider the failure of the District Court to let this case go to the jury, 350 U. S. 882," stated (p. 526):

> "The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

The charge that Prashker was guilty of contributory negligence rests entirely on the proposition that he wilfully flew in instrument conditions while not possessing an instrument rating. The only specific indication of what he did, however, is set forth in his own words on the control tower radio—that he found himself "unable to maintain VFR," and that he was "going to climb" (308a).

The court below admits that it is "inferrable from the time intervals involved" that before giving this message, and shortly after taking off from Allegheny County Airport, Prashker encountered worsening conditions, and turned back (Opinion, *infra,* p. 6a). This, of course, is the conduct of a reasonable, safe, pilot, who, after taking off in weather that is well above VFR requirements, and headed in a direction where all available weather reports show substantially bettter conditions, finds that the weather ahead of him is worse than he had a right to expect. He turns, in an attempt to return to the airport of his de-

parture, but finds himself trying to return through an area where the weather has deteriorated, and over a city, where Regulations forbid him from flying at less than 1,000 feet. He cannot go down. On his own statement he cannot maintain VFR at his level of flight. He does what, indeed, is the safest thing for him to do. He indicates to the tower controller (the aviation equivalent of a policeman on the ground) that he is going to climb so that the tower may warn other aircraft of his presence; and he does climb, to get as much space between himself and the ground as possible, and in the hope that he will find clear weather above.

Even if Prashker's conduct was not aided by a very strong presumption of due care on the part of a decedent, its every move (from his turning from his course to Cleveland to his message to the tower) smacks of due care. But, decisive of the question, is the very strong "presumption that the pilot exercised due care for his own safety". *Rennekamp* v. *Blair*, 375 Pa. 620, 101 A. 2d 669 (1954), applying Pennsylvania law, applicable herein, in a strikingly similar situation.[9]

The finding of contributory negligence, if indeed there was such a finding below, is in clear violation of the well settled principle, to which the court below pays lip service, that on a motion for a directed verdict at the close of plaintiff's case all evidence and inferences to be drawn there-

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[9] Respondents advanced the argument below that the mere fact that a VFR pilot flies in instrument weather constitutes a violation of Regulations. This is rebutted by holdings of the Civil Aeronautics Board in proceedings to remove or suspend pilots' licenses, brought by the CAA. The CAB held that mere fact not to be a violation. Rather, the determinative question is whether the pilot knew, in advance, that he would encounter instrument conditions, and continued to fly through those conditions nevertheless, or whether he was confronted with an emergency situation. See *Pope*, 13 CAB Rep. 514 (1950), *Jungersen*, 13 CAB Rep. 544, 553, 554 (1952), and *Jackson*, 13 CAB Rep. 103 (1945).

from must be read in the light most favorable to the plaintiffs. It is also a violation of the principle voiced in *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1945), and followed in Pennsylvania in *Antonelli* v. *Tumolo*, 390 Pa. 68, 73, 132 A. 2d 285 (1957) that it is error to take a case from the jury on the basis of inferences in favor of a defendant, when there are contrary inferences in favor of a plaintiff.

The decision below, if it is based on a finding of contributory negligence as a matter of law, demands exercise of this Court's supervisory powers, for it is a transparent invasion of the jury's province which should be checked here before it gets out of bounds.

**b. Failure to Prove Negligence and Breach of Warranty**

This Court has no more solemn duty than the protection of the Constitution and the rights and liberties guaranteed by it.

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of Federal jurisprudence which is protected by the Seventh Amendment, a right so fundamental and sacred to the citizen * * * should be jealously guarded by the court."

These are the opening lines of this Court's opinion in *Jacob* v. *City of New York*, 315 U. S. 752, 86 L. Ed. 1166, 1168 (1942), reversing the affirmance of a District Court's dismissal of an action at the close of plaintiff's case upon the ground that plaintiff had failed to prove facts sufficient to justify submitting to the jury the issue of defendant's negligence. Accord *Schulz* v. *Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608 (1956) which similarly, reversed a directed verdict at the close of plaintiff's case.

There can be no doubt that even without the important evidence of the 45 prior accidents, on the issues of dangerous condition and causation, petitioners far exceeded the minimum requirements of proof of negligence.

### (1) *Failure to Warn*

The *principal* allegation petitioners made was that Beech failed to give necessary warnings of a danger and propensity for structural failure in the Bonanza. The District Court admitted proof of seven prior Bonanza structural failure accidents on the limited issue of notice. It further admitted expert testimony that these reports gave notice of a danger, or accident propensity in the Bonanza (248a-251a, 271a, 272a).

Petitioners' expert, Dommasch, testified, on the basis of material admitted into evidence and within the knowledge of Beech, that the seven accident reports "constituted a notice" of the dangerous character of the Beech Bonanza (249a). He said it was "an indication of a pattern of characteristics which induced a certain type of response • • • notice that a group of characteristics of the airplane was such as to make the airplane accident prone under certain types of operating conditions • • • notice that the specific characteristics of this lateral directional oscillation behavior in turbulent air, its ability to drop its nose or, rather to accelerate very rapidly if the nose goes down under these conditions can as a combination produce a set of circumstances which can get a pilot into very serious trouble" (251a. See also 271a, 272a).

There is ample evidence, and it is undisputed, that respondents gave no warnings at all of a particular danger or propensity for failure in the Bonanza, to say nothing of a specific warning of the occurrence of the prior accidents (17a, 21a, 22a, 25a, 29a, 39a, 40a). Thus, even if there were no other evidence of notice in the record than the seven accident reports and Dommasch's testimony, above, petitioners would have established a prima facie case of negligence based upon respondents' failure to warn. Pennsylvania law provides that the nature and degree of the warning given must be proportionate to the nature and degree of the danger itself, *Maize* v.

*Atlantic Refining Co.*, 352 Pa. 31, 41 A. 2d 850 (1945). Involved in these seven accidents was the danger of death, for no one survived any of the accidents. It was obviously for the jury to say if the failure to warn, under the circumstances, was negligence.

In addition, however, there was admitted an aerodynamic report that Beech itself had prepared years before the Prashker accident, which demonstrated knowledge by Beech of the unusual danger in the airplane. The report (PX 72, 368a) considered the rapid rate of acceleration of the airplane in a nose down attitude and the use of dive brakes as a safety device. It states, in part:

> "The model 35 is considered a very high performance airplane for this class of plane yet may be operated by an inexperienced pilot. It has been considered, therefore, that dive brakes might be used as a safety feature and also for the psychological effect on the pilot. For example: if an inexperienced pilot enters a cloud and becomes confused, he might be endangered by the fact that the airplane, if flying 165 m.p.h. and in a slightly nose down condition, can in a few seconds build up to 190 or 200 m.p.h. At this point, 200 m.p.h., the flaps would be automatically extended. Even if the airplane attained a speed of 220 m.p.h. in a few seconds the airplane could still be decelerated to a normal speed without great discomfort or difficulty by the pilot."

Similarly, a second report prepared by Beech (PX 42, p. C-4, 340a) showed Beech's concern with the rate of acceleration in a nose down attitute of the Bonanza, particularly with respect to the possibility of its being flown by inexperienced pilots. It set forth a rate of acceleration which Beech's own Chief of Aerodynamics, Gordon, called to testify by the petitioners, reluctantly admitted was so fast, it was "impossible" (218a-221a).

A report of the National Advisory Committee on Aeronautics received by Beech (PX 22, 340a), stated: "the ease with which the Bonanza airplane can exceed its maximum allowable air speed could make it difficult for an inexperienced pilot to maintain a safe speed." In another place (p. 14) it referred to "the ease with which the airplane can exceed its maximum allowable airspeed *in relatively gradual dives.*" (italics supplied). And in still another section it reported that "as a result of the low damping of the lateral oscillations the Bonanza was subject to continuous oscillations in rough air. * * * The pilot stated that it was impossible to stop these rough air excited oscillations." (118a).

There was also evidence that, in addition to the seven instances of structural failure in flight, there were other instances, known and investigated by Beech, of structural deformation short of complete failure, also caused by the development of excessive loads in flight (316a-317a). With the admitted fact that no warnings of a danger or propensity for failure in the airplane were given Prashker, the finding by the court below that the petitioners had failed to prove negligence, even on the sole basis of failure to warn, is astounding. The court below says (Opinion, *infra*, pp. 8a-9a):

> "Even if it can be said that there is a duty to warn of the dangers in exceeding the inherent restrictions in any aircraft, that duty was adequately discharged by the warnings to avoid instrument flight conditions which would be the only anticipated way the restrictions could be unintentionally exceeded by a pilot."

This finding is a shocking deprival to the petitioners of their constitutional right to have a jury make that determination. It was clearly for the jury to say if the nature of the information given by respondents, none of which pointed to an unusual danger or propensity in the Bonanza, satisfied their duty to warn under the circumstances. See

the striking recent case of *Tampa Drug Co.* v. *Wait*, 103 So. 2d 603 (Fla., 1958) where the court held it was for the *jury* to decide whether a manufacturer of a floor cleaning fluid containing dangerous carbon tetrachloride, which had in fact included a warning on the product's label, had given *sufficient* warning.

### (2) *Negligent Design*

The court below virtually ignores petitioners' principal claim of failure to warn and confines its consideration to the claim of negligent design. And, even in doing that, it careens blithely through the evidence, accepting only that view and those inferences that support its conclusion. In this respect also, it is in direct conflict with the principle of *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1945), and *Antonelli* v. *Tumulo*, 390 Pa. 68 (1957), 132 A. 2d 285, that a verdict may not be directed, on the basis of inferences against a party, when there are contrary inferences in his favor.

First, the court below examines the three principal design defects alleged by petitioners *seriatim* despite petitioners' assertion that it was the unique *combination* of these characteristics that made the airplane exceedingly dangerous. The court thus disposes of petitioners' charge that the stick loads were dangerously light, by pointing out that they exceeded military requirements for planes designed to perform even more violent maneuvers than the Bonanza. That military planes generally have much greater structural strength (ability to withstand loads), that they do not have the Bonanza's unique "V" tail which cuts down drag and allows the airplane to pick up speed so rapidly, and that they do not have the Bonanza's unique oscillation-induced accelerations — these things are not mentioned by the court below. Yet it is the existence of these characteristics in the Bonanza that requires high stick forces. In short, it is the *combination* of characteristics that make the Bonanza unsafe.

The court below ignores the fact that the Bonanza's oscillations are of a most extraordinary kind. They produce accelerations (rates of changes of speed) that induce vertigo and disorientation on the part of a pilot (229a-230a, 281a, 285a). Furthermore, even the highly skilled test pilots of the National Advisory Committee on Aeronautics found it "impossible to stop these rough air excited oscillations" in the Bonanza (PX 22, 118a). The proof was that all aircraft do not have the same oscillation characteristics, and all do not pitch to the same degree (276a, 134c).

The court below states (Opinion, *infra*, p. 7a) "but the testimony was that the nose of the Bonanza does not drop of its own accord." This was the testimony of Beech's Chief of Aerodynamics, which itself was full of qualifications (51c). It was contradicted by Dommasch who stated that in view of the design of the Bonanza's unique "V" tail; it was possible that a pitching motion could be inadvertently induced by the pilot (232a-233a). It was also contradicted by his testimony that the NACA report showed a rapid nose down pitch and build up of speed associated with it (Transcript, p. 1762).

The court below then states (Opinion, *infra*, p. 8a) "the acceleration once the plane was in a nose down attitude was not extreme for an aircraft of clean design." Plaintiff's Exhibits 22, 42 and 72, discussed at pages 20-21, *supra*, were strikingly to the contrary.

The court below has read the evidence in the light most *unfavorable* to petitioners, contrary to the well established principle set forth in its own opinion (*infra*, p. 4a). Even on the claim of negligent design, petitioners proved a *prima facie* case.

More is at stake here than the interests of the parties to this controversy. The right to jury trial itself has been impaired. In the past this court has exercised its supervisory powers to prevent infringement of jury trial far

less sweeping and far less dangerous than occurred below. In *Union Trust Company* v. *Eastern Airlines, Inc.*, 350 U. S. 907, 76 S. Ct. 192 (1955), this court granted certiorari and summarily reversed an order of the Court of Appeals for the District of Columbia Circuit which set aside a jury verdict and ordered a new trial in a diversity action brought by the estates of deceased passengers against an airline.

In *Swofford* v. *Atlantic Coast Line R. R.*, 350 U. S. 807 (1955), a diversity of citizenship negligence action, this Court granted certiorari and summarily reversed the Court of Appeals for the Fifth Circuit which had reversed a jury verdict for plaintiff on the ground that the evidence required a finding that the accident had been due solely to the negligence of plaintiff's decedent.

In *Gibson* v. *Phillips Petroleum Company*, 352 U. S. 874, 77 S. Ct. 16 (1956), this court again granted certiorari and summarily reversed the reversal of a jury verdict and direction of a verdict for defendant by the Court of Appeals for the Fifth Circuit in a diversity negligence suit. In *Pokora* v. *Wabash Railway Co.*, 292 U. S. 98 (1934), cert. granted 290 U. S. 624 (1933), this court granted certiorari and reversed the affirmance of a directed verdict for the defendant, in a grade-crossing diversity case, on the ground that the plaintiff was guilty of contributory negligence.

In *Tenant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35, 88 L. Ed. 525 (1943), an action brought under the Federal Employers Liability Act, this Court, finding "no reason * * * why we should abdicate our duty to protect and guard that rig[illegible] [jury trial]," granted certiorari and reversed a Circuit Court reversal of a jury verdict. In the exercise of its supervisory powers, this Court should correct the excesses below.

### 3. The decision below adversely affects the rights of many other litigants, present and future. It is improperly, though implicitly, based upon the findings of an administrative agency.

The Beechcraft Bonanza was manufactured and certificated under Part 3 of the Civil Air Regulations—the section of the Civil Air Regulations, promulgated by the Civil Aeronautics Board, applicable to most private airplanes and all private single-engine airplanes. The airplane meets all the standards of Part 3 and, largely for that reason, has been approved as "safe" by the Civil Aeronautics Administration (23c-26c). It meets all the specific tests that a Part 3 airplane is subjected to. Yet, even before the first Bonanza was sold, in 1947, Beech knew that it was unusually subject to structural failure in flight, particularly when being flown by an inexperienced pilot (PX 72, 368a, quoted, *supra*, p. 20).

From the time of its initial sale Bonanzas have come apart with alarming frequency. The accidents did not stop with the Prashker accident, which was number 46, but have continued at about the same rate. At the time the trial herein started (September, 1957) there had been 74 such accidents according to CAA and CAB reports in petitioners' possession. One Bonanza came apart in the air while the trial was on, and from October 9th, 1957, when the District Court directed a verdict through the end of 1957, four more disintegrated, making a total of 79 through the end of 1957, with no survivors of any of the accidents. Petitioners do not know how many have occurred since 1957.

These accidents have been investigated, some by the CAB, which is the agency that promulgated the standards, and some by the CAA, which granted the approval. They have been considered separately, one at a time. When thus viewed they have often appeared to be instances of pilot error—in flying into bad weather.

The petitioners herein were the first, so far as is known, to pinpoint the design of the airplane as the cause of these accidents. They were the first to discover that the Bonanza's rate of structural failure was 15 times the rate for all other comparable airplanes, despite the fact that the statistical material which demonstrated this fact was official CAA and CAB information which obviously had been available to these agencies, and which they had ignored.

Seven other actions arising out of Bonanza disintegration accidents are now pending.[10] If the evidence of other accidents is irrelevant in the *Prashker* case, it is presumably irrelevant in the other cases. Some of the other actions involve pilots who had instrument ratings and a perfect right to fly in instrument weather. Some involve the application of the law of comparative negligence. Yet, if the decision below stands, and particularly if the accident reports and statistical comparison are held to be "irrelevant", it is doubtful that any one of the plaintiffs in those cases can prove a case.

And, since there have been many other accidents, wherein suit has not been instituted, and accidents that have not yet happened but that will happen until the negligent situation is corrected, many other potential litigants will be denied just redress by virtue of the decision below.

In the briefs and arguments below respondents took the position that CAA approval of the airplane established due care on the part of respondents as a matter of law. (See, for example, Beech's brief below, pp. 3-5, 27.) The court expressed great interest in this proposition in its questions to counsel on the argument below. Yet in its

[10] In the United States District Court for the District of Delaware: *Cleminshaw* v. *Beech*, Civil No. 1067, *Mitchell* v. *Beech*, Civil No. 1783, *Day* v. *Beech*, Civil No. 1828, *Johnstone* v. *Beech and Atlantic*, Civil No. 1881, and *Van Alphen* v. *Beech*, Civil No. 2028. In the Delaware State Court: *Weissman* v. *Beech and Atlantic*, Civil No. 865 (also arising out of the Prashker accident), and *Wesson* v. *Beech*, Civil No. 1278.

opinion the court below carefully refrains from basing its decision on CAA approval. The court does say, in part (Opinion, *infra*, p. 7a) "any airplane certificated by the CAA as was the Bonanza must be statically stable." Petitioners would agree with this statement only with the qualification that the term, "statically stable," is used as defined in the Civil Air Regulations, and according to the very limited criteria used by the CAA in making the determination. Mr. Dommasch testified that the Civil Air Regulations, insofar as they apply to stability characteristics, were so general as to lose meaning completely. He said (transcript p. 1988):

> "* * * this cannot be in my opinion considered detailed. If you say a maximum should be 40 pounds, and there is no minimum, it is saying that the maximum weight of every human being will not exceed a thousand pounds and calling this descriptive of a human being or specific information.
>
> * * * * * *
>
> I do not criticize the regulations in any way, but I do hold that there is a great deal of room for producing a wide variety of characteristics; they are not tied down specifically; * * *"

To have recited in its opinion the patently erroneous doctrine advanced by respondents, that government approval establishes due care as a matter of law, would have been to have invited quick reversal by his Court. But we suggest that it is there just the same, even in addition to the specific reliance, indicated above, on the CAA's finding of static stability. There is no other reasonable way to explain the amazingly wrong decision of the court below (1) on the admission of evidence, (2) on contributory negligence as a matter of law, and (3) on the legal sufficiency of the evidence presented. The court below has arrogated to itself the power to decide that petitioners are not entitled to recover. It has done so with one eye on CAA approval and another eye on the practical consequences of

a verdict for the petitioners herein. It has usurped that power from the jury, guaranteed to petitioners by the Constitution. And it has taken the precious right of jury trial from other victims of these needless accidents, as well.

If this right can be impaired in the instant case because governmental agencies with presumed competence in the field have decided that an airplane is safe, or because the consequences of a plaintiffs' verdict are far reaching, then the structure of the jury system itself is threatened. The decision below represents a gross and alarming departure from our constitutional tradition of jury trial, which this Court should check here.

## CONCLUSION

**The decision below is grounded upon an apparent indifference to the jury's exclusive function and right to decide contested questions of fact. It is a gross and alarming departure from our constitutional jury tradition which should be checked here. If the many families affected are to be protected, if more than lip service to the jury system is to be compelled, and if the right of jury trial is to be guarded against the errosive effect of labelling obviously admissible evidence "irrelevant"—then the decision of the court below must be reviewed and reversed here. In the exercise of its supervisory jurisdiction, this Court should grant the petition for a writ of certiorari.**

Respectfully submitted,

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# APPENDIX

## UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,445

GOLDIE B. PRASHKER, EXECUTRIX OF THE ESTATE OF NATHAN PRASHKER, DECEASED, AND CHOICE EMBROIDERY & LACES, INC.,

*Appellants,*

*v.*

BEECH AIRCRAFT CORPORATION AND ATLANTIC AVIATION CORPORATION.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Argued April 18, 1958

Before GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges.*

## Opinion of the Court

(Filed July 21, 1958)

By McLAUGHLIN, *Circuit Judge.*

Nathan Prashker was a young man, twenty-seven years old, unmarried, president of a family corporation, and the holder of a private pilot's license with some 215 hours flying time to his credit. On October 5, 1953 he undertook to fly from Allegheny County Airport near Pittsburgh to Cleveland, about 130 miles distant, with his cousin, a young man who was the father of several children. The visual flight plan filed with the Allegheny tower by Prashker called for a flight of approximately 42 minutes at 3,000 feet in a

Beechcraft Bonanza, N 2168 D, recently acquired by the family corporation and in which Prashker had logged some forty hours of flying time.

At the take-off point the ceiling was estimated as 1800 feet, visibility four miles with light rain and haze. At the Greater Pittsburgh Airport conditions were better with broken clouds at 3,000 feet, overcast at 9,000 feet, visibility 12 miles with light rain. At Cleveland the ceiling was 15,000 feet with broken clouds below that, visibility 12 miles. There is no indication other than that he was in the habit of doing so that the weather conditions actually were checked by Nathan Prashker.

N 2168 D with Nathan Prashker at the controls departed Allegheny County Airport at 12:09 P.M. headed in a northwest by west direction with instructions to use caution in passing through the Greater Pittsburgh area which had a lot of instrument traffic. At 12:22 the pilot called Allegheny tower by radio, advising that he was over the City of Pittsburgh at 2,300 feet, was unable to maintain visual references, and that he was into and climbing up through the overcast. Immediately after the tower had advised that their last report for the tops of the overcast had been 3,800 feet, Pittsburgh tower, who apparently had heard Prashker report, called Allegheny tower to advise that a jet reported the cloud tops at 33,000 feet. This information was relayed to N 2168 D and the pilot was then asked for his approximate position. Prashker replied tensely that he didn't know. He was asked if he wanted to return to the airport and he nervously said that he did but that he didn't know his position and that he was incapable of flying on instruments.

Immediately Allegheny tower asked Pittsburgh tower to take a direction-finding reading on N 2168 D's transmissions and the pilot was told to give a short count. The tower heard him give the count and his identification. Pittsburgh tower then told them to have the pilot steer 325 degrees magnetic; this was immediately relayed to the pilot with the

information that it would take him to Greater Pittsburgh Airport and that he should break out "in the vicinity of the river". The acknowledgement came as a broken and poor transmission. Allegheny tower repeated the steer and advised that the plane switch radio frequencies to work the Greater Pittsburgh Airport, but there was no acknowledgement. Repeated calls in the next minute were not answered.

Then at 12:27 an outside telephone call was received from a woman reporting that she and a neighbor had just seen an aircraft go behind a hill and that they thought it had crashed. Eight minutes later a man called to report that he and his co-workers had seen a wing fall off a plane and that the plane had crashed in Pangburn Hollow, near Elizabeth, Pennsylvania.

The crash scene was in a hilly, heavily wooded area near but out of sight of the Monongahela River, about 8 miles south-southeast of the Allegheny County Airport. The left wing was detached from the main body of wreckage and lay about 250 yards back along the flight path. The left stabilizer and part of the rudder were missing.

These actions were brought in Delaware against Beech Aircraft Corporation as the manufacturer of the Bonanza and against Atlantic Aviation Corporation as the seller of the aircraft, both of them Delaware corporations, by the executrix of the estate of Nathan Prashker and by Choice Embroidery and Lace Company, the Prashker family corporation, incorporated in New York, which owned the aircraft.[1] Jurisdiction is based on diversity of citizenship.

The claims against Atlantic are for breach of the implied warranty of merchantability and for negligent failure to warn of known dangerous propensities of the aircraft. Four allegations of negligence are made against Beech: (1) that the airplane was improperly designed; (2) that after receiving notice of the improper design it failed to make changes; (3) that there was a failure to include

[1] The executrix herself is a New Jersey resident; the decedent was a resident of Pennsylvania.

necessary safety devices; and (4) that there was a failure to warn of the prospective dangers. Additionally there is an allegation sounding in deceit that it was a conscious policy of Beech to disseminate false information as to the strength and safety of the Bonanza. There was further a claim against Beech for breach of warranty.

At the conclusion of a three week presentation of the plaintiffs' evidence, the trial court directed a verdict in favor of the defendants on the grounds that Nathan Prashker had incontrovertibly been contributorily negligent, thereby barring recovery on any claims of negligence, that there was no privity between Beech and the plaintiffs to sustain recovery on breach of warranty under the applicable law of Kansas, and that though there was an implied warranty of merchantability between Atlantic and the plaintiffs there could be no recovery thereon when the damage to the plaintiffs had been proximately caused by their own representative's contributory negligence.

It is a truism that on a motion by the defendant for a directed verdict at the close of the plaintiff's case, the evidence and all the inferences reasonably to be drawn therefrom must be viewed in the light most favorable to the plaintiff.

We consider first the matter of Nathan Prashker's contributory negligence. Because the harm occurred in Pennsylvania, that is the place of the alleged tort. The United States District Court of Delaware in a diversity action posing a conflict of laws question looks to the conflicts rule of Delaware to determine the law to be applied. Klaxon Co. v. Stentor Electric Mfg. Co., 314 U.S. 487 (1941). Delaware follows the usual course of looking to the law of the place of the alleged tort to determine the substantive rights of the parties arising thereform. Pack v. Beech Aircraft Co., 132 A.2d 54 (Del.S.Ct. 1957); Restatment, Conflict of Laws, §384. Thus, the law of Pennsylvania was applied by the District Court and will be looked to by us.

*Appendix.*

The Civil Air Regulations, which were put into evidence in this case, prohibit flying under instrument conditions by a pilot without an instrument rating and without recent practice.[2] A pilot without instrument qualifications must adhere to the visual flight rules. These prohibit flying when visibility is less than three miles or when the ceiling is less than 1,000 feet. Additionally they require that a visibility of three miles be maintained at all times while in flight and that the plane approach clouds no closer than 2,000 feet horizontally, 500 vertically under, and 1,000 feet vertically over.[3] The regulations do contain a provision, however, which permits departure from the other Regulations in event of emergency.[4] We mention the regulations of the Civil Aeronautics Board in order to establish impartial and authoritative criteria for judging the question presented to us.

The evidence shows that the necessity of prohibitions on flight under instrument conditions by unqualified pilots is dictated by the extreme likelihood of loss of control over the aircraft once visual points of reference become unavailable. This likelihood arises out of a vertigo induced by the movements of the aircraft in which the pilot becomes disoriented in space to the point where he has difficulty in distinguishing between right and left and up and down. Normal sense perceptions are unreliable to the point of being actively misleading. The plane can quickly go out of control in such circumstances. Even if the pilot can recognize what maneuver the out-of-control plane is performing his tendency is to over-correct. The consequence is for the plane again to go out of control, or if the correction is too violent resulting in an attempted maneuver for which the plane is not designed, to tear the plane apart in mid-air by reason of the extreme forces exerted on it.

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[2] 14 C.F.R. 43.65 and 43.68.
[3] 14 C.F.R. 60.30 and 60.31.
[4] 14 C.F.R 60.2.

Nathan Prashker knew, or certainly should have known, about and understood these and other factors involved in flight safety. Much of the literature put into his hands by the defendants at the time the Bonanza was purchased and afterwards emphasized the necessity for maintaining positive control over the aircraft at all times; it emphasized, too, the extreme danger of losing that control when instrument flight conditions were encountered by a pilot insufficiently skilled in coping with the difficulties peculiar to instrument flying. Nathan Prashker knew, too, that his craft was a faster, aerodynamically "cleaner" airplane than had been the three he had owned previously at various times, and that such an airplane could rapidly get into serious trouble if not skillfully operated. A fast, "clean" airplane is more difficult to fly, both on visual flight rules and on instruments because it responds to control quickly and easily. The control exercised must, therefore, be skilled. In fact, Nathan Prashker doubtless had the skill requisite to handle the Bonanza so long as he remained within the limitations imposed by the visual flight rules and stayed out of instrument conditions.

The facts, however, demonstrate that Nathan Prashker, wittingly or not, made a number of decisions involving bad judgment which set the stage for the ensuing tragedy. To begin with he elected to take off from the Allegheny County Airport in marginal weather conditions, judged by the visual flight rules. He thus assumed the risk of getting into poorer flight conditions, even though he undoubtedly hoped and may even have assumed that they would improve. It is inferable from the time-intervals involved that he shortly did encounter worsening conditions and that he turned back toward Pittsburgh. Over the city he made the grievous mistake of electing to go into the overcast in an attempt to climb through it.

There was elicited on cross-examination from a part-time employee of Atlantic's, who was also an airlines pilot of some 10,000 hours experience, testimony that he had

never encountered a weather condition which he could not have avoided either by going around, by turning back, or presumably by staying on the ground in the first place. It is apparent, then, that what are alleged to be defects in the Bonanza only become significant because Prashker had gotten himself into a situation in which causes beyond his ability to control inexorably commenced to operate.

A decision based on Prashker's contributory negligence alone would depend on a preliminary holding that the evidence would not support an inference that bad weather may have closed in on him even though he was exercising due care for his own safety. We incline to the view that no such inference is available, but concede that the question may be arguable. Therefore, and because the case has been so thoroughly and well presented to us, we prefer to rely also on an alternative ground for decision. We think that no negligence can be imputed to the defendants.

Plaintiffs asserted that the Bonanza had been negligently designed; they have attempted to spell out three specific defects. The first of these alleged defects is that the Bonanza model involved is subject to a lateral oscillation of some two or three degrees on either side of a norm in rough-air flight, and that this oscillation induces vertigo whenever visual references become unavailable. But there was undisputed evidence that any aircraft under similar flight conditions is subject to some lateral oscillation. The conclusion is that, although the existence of oscillations may explain how vertigo is induced, vertigo cannot be avoided except by avoiding the loss of a visual reference; in instrument flight the reference is supplied by the instruments which in their use require a degree of skill amounting to an art.

Another alleged defect was that the plane tended to assume a nose-down attitude and once in that position accelerated dangerously. But the testimony was that the nose of the Bonanza does not drop of its own accord. Any airplane certificated by the C.A.A. as was the Bonanza must

be statically stable. The acceleration once the plane was in a nose-down attitude was not extreme for an aircraft of clean design; again this particular aircraft required a measure of skill in flying it, and Nathan Prashker apparently had that skill so long as he remained within the limitations of the visual flight rules as he was required to do. Plaintiffs allege that the Bonanza would have been a safer plane had it been equipped with dive brakes. Beech had in fact considered the use of dive-brakes but had abandoned the idea largely because much the same result could be achieved by extending the landing gear. It is doubtful in the extreme that Nathan Prashker would have thought to use the dive brakes even had they been installed because the landing gear was still retracted after the plane had crashed.

The third alleged defect of which plaintiffs complain is that stick-loads were dangerously light. They are important in preventing the pilot, when under stress, from violently moving the controls, thereby imposing such stress on the plane structure in its attempt to respond that it disintegrates. It appeared, however, that the Bonanza's stick-loads exceeded those imposed by the military for their aircraft designed to perform more violent maneuvers than is the Bonanza.

In short all these alleged defects were either nonexistent or present to an unavoidable extent known to Nathan Prashker. Heeding the fundamental warning against an unqualified pilot's getting into instrument conditions is the surest means to avoid unintentionally exceeding the inherent restrictions in the design of any aircraft. That Nathan Prashker could have violated that tenet without negligence on his part does not, of course, make the defendants liable absent negligence on their part. Even if it can be said that there is a duty to warn of the dangers in exceeding the inherent restriction in any aircraft, that duty was adequately discharged by the warnings to avoid instrument flight conditions which would be the

only anticipatable way the restrictions could be unintentionally exceeded by a pilot.

We turn now to a consideration of the claims for breach of warranty. Again the conflicts rule of Delaware is looked to in order to determine what law shall be applied to judging these claims arising out of contract. No reason is perceived why Delaware would refuse to apply the law that the parties have stipulated to be the governing law by reason of the contract of sale of the airplane having been entered there by Beech as seller and Atlantic as buyer. Cf. Wilmington Trust Co. v. Wilmington Trust Co., 24 A. 2d 309 (Del. Ch. 1942). The law of Kansas will, therefore, be applied to determining the breach of whatever warranties accompanied the sale.

We think on the basis of the foregoing discussion dealing with the physical limitations on airplane design, that the plaintiffs' evidence concerning breach of warranty was insufficient to go to the jury. The evidence fails to demonstrate any breach of either an express or implied warranty by Beech. We therefore pass without deciding the question of whether the law of Kansas would require privity between Beech and the plaintiffs.

As for the claimed breach of the implied warranty of merchantability between Choice and Atlantic, we apply, through the Delaware rule of conflicts, the law of New Jersey where the sale occurred, both for construing the contract, Harris v. N.Y. Life Insurance Co., 33 A.2d 154 (Del. Ch. 1943). Lams v. F. H. Smith Co., 178 A. 651 (Del. Super. 1935), and for ascertaining damages arising from any breach, Canadian Industrial Alcohol Co. v. Nelson, 188 A. 39 (Del.S.Ct. 1936).

The measure of damages which Choice asserts is the value of the airplane, and not simply the difference in value between the aircraft at the time it was sold and the value of a similar plane free from the alleged defects making the plane unmerchantable. The measure of damages for a breach of warranty is, under New Jersey law, the loss

directly and naturally resulting in the ordinary course of events from such breach. DeRose v. Hunter Lindsay Corp., 41 N.J. Super. 178 (App. Div. 1956); Somerville Container Sales v. General Metal Corp., 39 N.J. Super. 348, amended 39 N.J. Super. 562 (App. Div. 1956). The inescapable inference is that the damage complained of must stem from the breach of warranty and not from some other cause. Thus, it is clear that if the damage to the plane was proximately caused by the negligence of Choice's pilot, Choice cannot recover. Cf. Heath v. Channel Lumber Co., Inc., 25 N.J. Super. 6, (App. Div. 1953). But since we have not rested our decision as to the negligence issues solely on Nathan Prashker's contributory negligence, neither do we do so on this point; again, the plaintiff's evidence fails to prove that the plane was not reasonably fit for flying.

One point remains for discussion and decision. Plaintiffs complain of the trial court's ruling which prevented them from putting into evidence the reports of forty-five fatal accidents involving structural failure in flight of Bonanzas both on the issue of cause and on the issue of notice. The court permitted the introduction of only seven of the accident reports limited solely to the issue of notice of the alleged defects. The plaintiffs also offered evidence, which was rejected on both issues, of government satistics known to Beech that over a six year period prior to the accident in question the Bonanza had a rate of structural failure in flight approximately fifteen times the rate for all other single engine civil aircraft.

The first issue confronting the trial court upon the offer of the reports was whether evidence of accidents to one model of the Bonanza could be relevant as to the cause of accidents in other models. The court was justified in putting the plaintiffs to their proof that the five different Bonanza models involved in the series of accidents were similar. The court ultimately decided that the models were more like each other than like any other airplane.

At the same time the court was justified in excluding evidence as to accidents to the first model. The sum of the changes made in the design of the first model through four subsequent models permitted the trial court to regard the first and fifth planes as dissimilar aircraft. Evidence of accidents in the first model would not have been sufficiently material to the cause of accidents in the fifth model to require its admission. The two most significant changes from the preceding models occurred between the first and the second and between the third and fourth. The first of these changes involved increasing the limit design load factor from 3.8 G's to 4.4 G's which moved the plane from the C.A.A.'s normal category to the utility category for certification purposes. At the same time gross weight was increased. These changes improved the structural strength of the airplane. The second significant change was to the dihedral and area of the tail which affected the plane's handling characteristics.

The second issue confronting the trial court, once it had initially determined what models for purposes of the case were identical and which reports could therefore be relevant and material, was to decide whether the accident reports were indeed relevant on the issues for which they were offered. The court found that on the issue of notice of possible defects the reports were relevant, but that as to the cause of this accident they were irrelevant. Similarly the statistics were ruled irrelevant.

The determinations of irrelevancy were proper. Each accident report involved an instance of structural failure in flight where the airplane was, as plaintiffs assert, "pulled apart by loads in excess of its stress limitations." And yet the stress limitations exceeded those which the Civil Aeronautics Administration required as sufficient to assure flight safety. Showing that the planes came apart is not enough because of the compromise required with structural strength in designing an aircraft which will get off the ground. To be relevant on the issue of causation attribut-

able to a design defect the accident reports would have had to show at least that the planes involved had not gone out of control prior to their coming apart, or if they had gone out of control, that it had been without fault by the pilot. The seven reports in evidence—and they may be assumed best to present the plaintiffs' case—invariably involve pilots unqualified to fly under instrument conditions who nonetheless were in such conditions or, in a few instances involving the unadmitted reports, pilots qualified for instrument flight who were in turbulent weather when the accidents occurred. To hold the aircraft responsible on such evidence would be utterly to disrgard the factor of human fallibility known inevitably to occur in such circumstances and would be patently unjustified. The reports, therefore, do not tend to prove the existence of a defect in design of the Bonanza. The cases cited by plaintiffs on the admissibility of prior occurrences as evidencing existence of a dangerous condition are consequently inapposite.

The statistic as to rate of structural failure of the Bonanza is, on its face, startling. But it involves the same accidents which were the subjects of the reports above discussed. In view of what amounts to an explanation of each accident which contributed to the ultimate statistic, that statistic itself has no relevance as notice to Beech of the existence of a defect. As to the issue of causation by a design defect, the statistic tends to prove nothing more than the individual accident reports. It is extremely dubious, in fact, whether statistic involving probabilities as to causation have any significance at all when applied to a particular incident.

Even were it assumed that the accident reports and statistics prove the Bonanza to be accident-prone under conditions of turbulence in instrument flight, probably the warning to stay out of such conditions and emphasizing the consequences of ignoring it would be enough. By "accident-prone" is meant that the plane has some characteristics which may, when a pilot loses visual reference, call upon

him for a much greater degree of skill than theretofore he had been required to exercise in controlling the airplane. If he has the skill and can make the adjustment quickly, he is safe. If the characteristics of the plane take it out of control before he adjusts, he is in serious trouble. If it is possible to get into turbulent instrument flight conditions despite the exercise of due care, then the pilot can be said, in view of the warning, to have assumed the risk of the accident proneness every time he flies subject to the possibility that he may encounter turbulent instrument conditions.

The limitation on introducing the evidence offered of other accidents for the purpose of showing notice of defects to Beech was, at the least, a proper exercise of the trial judge's discretion in conducting the course of the trial.

The judgment is affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

## Judgment.

Present: GOODRICH, MCLAUGHLIN and STALEY,

Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

HARRIET G. HUMPHRYS,
Chief Deputy Clerk.

July 21, 1958.

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## Opinion Sur Petition for Rehearing.

Present: GOODRICH, MCLAUGHLIN and STALEY,

Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court

Circuit Judge
MCLAUGHLIN.

Dated: August 7, 1958.

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JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1958.

## No. 476.

GOLDIE B. PRASHKER, Executrix of the Estate of Nathan Prashker, Deceased, and CHOICE EMBROIDERY & LACES, INC.,

*Petitioners,*

*v.*

BEECH AIRCRAFT CORPORATION

and

ATLANTIC AVIATION CORPORATION,

*Respondents.*

## BRIEF OF RESPONDENT, ATLANTIC AVIATION CORPORATION, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

# Supreme Court of the United States.

October Term 1958.

No. 476.

GOLDIE B. PRASHKER, EXECUTRIX OF THE ESTATE OF NATHAN PRASHKER, DECEASED, AND CHOICE EMBROIDERY & LACES, INC.,

*Petitioners,*

*v.*

BEECH AIRCRAFT CORPORATION AND ATLANTIC AVIATION CORPORATION,

*Respondents.*

## BRIEF OF RESPONDENT, ATLANTIC AVIATION CORPORATION, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

### MATTER OMITTED (1)(a), (b) and (c).

A reference to the official and unofficial reports of the opinion delivered by the court below, the grounds of jurisdiction of this Court advanced by the petitioners and the constitutional provisions supposedly involved are omitted pursuant to Rule 40(1), (2) and (3).

## QUESTIONS PRESENTED FOR REVIEW (1)(d).

I. Was there any proof of the negligence charged against Atlantic?

II. Was there any proof by the petitioners, which would entitle them to recover on breach of warranty on the part of Atlantic?

III. Did the petitioners' evidence affirmatively show contributory negligence on the part of Prashker?

IV. When there has been failure to prove plaintiff's charges of negligence and breach of warranty against one of two defendants and there has been affirmative evidence of negligence on the part of a person, whose negligence is imputable to the plaintiff, has the plaintiff been denied his right to trial by jury as against that defendant when the trial court directs a verdict for that defendant and the Court of Appeals affirms?

## COUNTER STATEMENT OF THE CASE (1)(e).

### A. The Facts.

Atlantic does not agree with the petitioners' statement of the facts.

A commercial airplane is essentially a compromise (8b, 30b, 32b, 35b). It must be light enough to get off the ground; therefore the strength of its parts must be designed with this requirement in mind. On the other hand it must be strong enough to withstand stresses up to a predetermined limit; therefore, its parts must be designed to withstand such stresses. Again, the plane must not only be light enough to get itself off the ground; in addition, it must be able to carry enough of a load to make it a practical means of getting from one place to another (30b); therefore, the plane's ability to carry not only itself but a "pay load" must enter into the design of the plane. The plane must also be able to get from one place to another at such a speed that it is attractive in comparison with other forms of conveyance. Speed is mainly, though not entirely, a function of the plane's power plant; therefore, the requirements of the engine must be balanced with the plane's other requirements. The result is that a plane

1. The deceased, Nathan Prashker, will be referred to as Prashker; the petitioner, Choice Embroidery & Laces, Inc., as Choice; the respondents, Beech Aircraft Corporation as Beech and Atlantic Aviation Corporation as Atlantic; pages of the petitioners' appendices in the Court of Appeals thus: 40a; of Atlantic's 40b; of Beech's 40c; of the petitioner's first brief in the Court of Appeals (1 PB 45); of the petitioners' second brief in the Court of Appeals (2 PB 45); of the petition for writ of certiorari (PP cert. 40); the Civil Aeronautics Board as the CAB, the Civil Aeronautics Authority as the CAA; the Civil Air Regulations, promulgated by the latter, as the CAR's; "Visual Flight Rules", the regulations for flying when the pilot has a visual point of reference outside the plane, as VFR; "Instrument Flight Rules", the regulations for flying when the pilot has no such visual point of reference, IFR. In quotations, italics and matter in parentheses are added unless otherwise noted.

is a compromise between the requirements of all the factors, which go into its design and manufacture. As the petitioners admitted in their opening, no plane can be designed which cannot be torn apart in the air by the forces of nature, to which the plane is exposed in flight, or by abuse on the pilot's part (8b, 23b, 29b, 31b, 35b).[2]

The Government has not been satisfied to let free play between "Let the buyer beware" and implied warranties, imposed on the seller by law, determine what planes may be sold or flown. Consequently, Congress has established two agencies, the CAB and the CAA, 49 U. S. C. 551, 552, which prescribe standards, CAR's, for the examination of the characteristics of every type of plane, which it is proposed to manufacture; if the type passes the CAA's rigorous requirements, a type certificate is issued (81b, 82a, 82b, 83b). Such a type certificate is issued for the Beechcraft Model D-35, one of which is involved in this action (124b). Then every plane is individually tested. The very plane, in which Prashker crashed, was tested by the CAA and a certificate was issued that it was "airworthy", i.e., met the requirements of the CAB and was fit to fly (82b).

The CAR's also prescribe standards for the qualification of pilots and for their conduct.

The plane involved was sold new by the respondent, Beech, the manufacturer, to the respondent, Atlantic, the distributor, in Kansas, flown to New Jersey, where it was used by Atlantic as a demonstrator or for similar purposes until July 21, 1953 (23a) when it had about fifty hours flying time on it (3b). On that date, it was sold in New Jersey by Atlantic to Choice and, after the sale, was flown for another fifty hours by at least three pilots.

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2. The petitioners refer (PP cert. 10) critically to the Court of Appeals' statement that a plane may come apart in the air "because of the compromise required in designing an aircraft which will get off the ground". The petitioners said substantially the same thing in their opening to the jury (8b).

Prashker, the deceased, his brother, Harold Prashker (14a) and Gorski (51b), the proprietor of the field where Choice had kept its other planes and kept the Bonanza until the date of the crash, October 5, 1953.

Prashker had a VFR license; he did not have an IFR license and never had such a license (8a). Under the CAR's, he was under a duty to keep five hundred feet above clouds, a thousand feet under clouds and two thousand feet away from them horizontally (47a); he was under a duty to keep out of instrument conditions, conditions where he had no visual point of reference, i.e., where by the use of his eyes, looking outside the plane, he could not see whether he was flying straight and level, climbing, diving or turning right or left (94b).

It is difficult for a person, who has never piloted a plane, to realize that, when a pilot is in instrument conditions, the only thing he sees ahead of him, on each side, below and above him, is a uniform mass of gray; thus he cannot tell from what he sees whether he is flying straight and level, climbing into a stall, diving toward the earth or unconsciously turning left or right into what becomes the "graveyard spiral" (38b, 94b). The only way he can tell what he is doing is by disregarding everything but his instruments. But flying on instruments is a delicate operation, requiring rigorous training and continuous practice (18a, 19b, 32b). Prashker had neither training nor practice (18a, 19a) as an instrument pilot.

If a pilot, not qualified to fly on instruments, permits himself to get involved in instrument weather, the almost certain result is death in a matter of minutes for himself and his passengers (33b, 34b, 36b). As Captain Blakemore, a TWA pilot called by the petitioners, said, "Only a miracle can save him" (46a).

Prashker knew these facts before he bought the Bonanza; any pilot would know them (17b, 19b, 20b, 21b, 23b, 24b, 25b, 26b, 28b, 29b, 30b, 31b, 32b, 37b, 38b, 39b, 42b, 43b, 44b). They were reiterated in the literature, which

was furnished him with the Bonanza and which Prashker read and discussed with his brother (17b, 19b, 20b, 21b, 22b, 23b, 24b, 29b, 31b, 32b, 35b, 36b, 37b, 38b, 39b, 41b, 42b, 43b).

Prashker was aware of the supposed directional lateral oscillation of the Bonanza (wiggle in the tail), of which the petitioners complain, before he bought the plane; his reaction to his brother's calling his attention to this supposed characteristic was that that was inherent in the plane, there was nothing to be done about it or words to that effect and he continued to fly the plane (20a, 48b, 51b).

Prashker was not an inexperienced pilot; he, a friend of his, his brother and Choice had owned four planes, including the Bonanza, over a period of two years (113b). It is not clear exactly how the title to these planes had been held (45b) but that is immaterial. In any case, Prashker had flown them all (51b). The sequence had been an Aeronca, a Stinson, a Navion and finally the Bonanza (10b), a progression from slower to faster, "cleaner"[3] planes (18b). Prashker had flown more than 215 hours, in all the types of planes he had piloted (113b, 8a); he had taken courses in flying at New York University (10a). He had flown the Bonanza at least nineteen times, seventeen of which are logged, to which should be added the flight from New Jersey to Pittsburgh on October 3 and around Pittsburgh on October 4, 1953, the day before the crash, which are not logged (113b).

On October 5, 1953, at 12:09 P. M., Prashker, the president of Choice (5a), took off on company business with a passenger from Allegheny County Airport, southeast of Pittsburgh, northwest toward Cleveland on a VFR plan at a height of three thousand feet above sea level (75a). The VFR's prescribed that the minimums for take-off should be a thousand feet ceiling above the ground, not above sea

3. "Clean" in airplane jargon means a fast, streamlined plane with a low amount of drag (18b).

level (42a), and forward visibility of three miles (41a). When Prashker took off, the ceiling at Allegheny was "estimated" (304a) to be eighteen hundred feet above the ground and the visibility was four miles (304a). There was haze and light rain. The temperature was fifty, the dew point forty-eight (304a). When the temperature and dew point are close together, such a condition is an indication that fog, rain or changing weather conditions may be anticipated (122c). The take-off was uneventful and the Bonanza was last seen from the Allegheny tower about three miles out and on a direct course toward Cleveland (308a). The course, which Prashker had taken, took him directly over Pittsburgh, where the visibility was apt to be lessened by smoke from the industrial concentration there (43a). On leaving, he was warned about flying over Pittsburgh (310a).

Nothing more was heard from the plane until 12:22; the conversation between the tower and Prashker from 12:22 until 12:26 appears in full in the incident report. From the tone of Prashker's voice and the profane and filthy language, which he used, it is obvious that he was in panic and had lost control of himself (310a, 311a).

The statement of the Controller in the Allegheny Tower gives a dramatic account of what happened (309a-312a):

"Statement of Controller, Local Control and Approach Control Positions

1207 E Bonanza N2168D called Allegheny Tower by radio and requested taxi and take off instructions. I cleared Bonanza 68D to taxi Runway 5 or 30, pilot's choice, wind North 10 to 15 and altimeter 30.00. Bonanza 68D asked for Runway 30 and for detailed instructions as he was unfamiliar with the field. I issued detailed instructions to Bonanza 68D. Controller Armstr[illegible] who was working the Flight Data Position, required me to find out if N68D would close his flight plan with Cleveland Radio. I requested this in-

formation from N68D and the pilot advised that he would close with Cleveland Radio.

1209E Bonanza 68D requested take-off clearance and I cleared him for take-off on Runway 30. The take-off appeared normal in all respects. The aircraft was last observed on a straight out departure about 3 miles Northwest of the field and I advised him to use caution passing through the Greater Pittsburgh area as they have considerable instrument traffic.

1222E to 1226E Bonanza 68D called Allegheny Tower and advised that he was over the city at 2800 feet, unable to maintain VFR and was climbing to get on top. I advised N68D that the last tops we had were 3800 feet and suggested that if he was climbing to remain well clear of all airways or get an ATC clearance. The pilot advised that he was already in the G—D—— stuff and was climbing. Controller Armstrong advised me that Greater Pittsburgh Tower advised that a Jet reported the tops at 33,000 feet and they had nothing on inbetween layers. I relayed this to N68D, I then requested the approximate position that N68D was climbing up and he replied that he did not know his position. I then requested of the pilot if he desired to return to the airport, to which the pilot replied that he would, but did not know where he was except that he had entered the G—Dam— stuff over the city. I asked N68D if he was capable of flying instruments and the pilot replied that he was not qualified. I then asked N68D if he was VFR and the pilot replied NO, I cannot see a G— D— thing in this s— —, Controller Armstrong advised me to have the pilot count for a DF steer for Pittsburgh Tower. I did and the pilot counted. Controller Armstrong advised me that Pittsburgh Tower said to steer 325 degrees magnetic. I relayed this heading to N68D. I heard a carrier signal on the radio and then a very crackly voice first which was barely dis-

tinguishable and then 2 5. I repeated the steer, but received no acknowledgment. I transmitted to N2168D on all available frequencies in an attempt to reestablish contact with the aircraft but was unsuccessful.

1228E Controller Armstrong answered the outside telephone and then advised me that a Mrs. Fine reported seeing an aircraft go down between Elizabeth and Monongahela.

* * *

From the pilot's conversation it was very evident that he was excited and under considerable pressure after he advised that he was in the overcast and throughout the short period that we had radio contact with him.

IVAN L. MCCAFFERTY
Ivan L. McCafferty
Airway Operation Specialist.

The plane crashed about eight miles south and slightly east of Allegheny (63a, 76a). The course of the plane just prior to the crash was from northwest to southeast (59a).

The Bonanza had retractable landing gear. Before getting into overcast, a pilot should slow his speed and drop his flaps and landing gear, to provide drag for the plane (25b), which makes it more stable and easier to manage. Prashker had dropped neither landing gear nor flaps (73b).

A wing and a stabilizer had come off the plane under positive, i.e., upward, pressure (61a, 72b, 76b).

The petitioners did not charge that the wing and stabilizer came off because any of the parts of the plane were defective (8b).

At the time of the crash, the plane had been flown a little more than one hundred hours (75b).

### B. The Petitioners' Charges Against Atlantic.

It must be borne in mind (1) that the charges against the two respondents were different and (2) that the im-

portant evidence offered against Beech was not offered against Atlantic. The petitioners in their petition neglect to point out these two fundamental facts.

There were only two charges against Atlantic (PP cert. 3a):

(1) Breach of an implied warranty of merchantability.

(2) Negligent failure to warn of known dangerous propensities of the plane.

There were six charges against Beech (PP cert. 3a):

(1) Improper design.

(2) Failure to change design after notice of improper design.

(3) Failure to include necessary safety devices.

(4) Failure to warn of prospective dangers.

(5) A conscious policy on the part of Beech to disseminate false information as to the strength and safety of the Bonanza.

(6) Breach of warranty.

## SUMMARY OF ARGUMENT (1)(f)

I. The Prashker estate cannot recover against Atlantic for negligence because there was no proof of negligence on the part of Atlantic. The petitioners' important evidence on negligence was not offered against Atlantic. The statistics as to Bonanza failures compared with failures of other planes, the reports of Beech's investigations of prior accidents and the testimony of the petitioners' expert, Dommasch, were offered only against Beech.

II. Choice cannot recover from Atlantic for breach of an implied warranty of merchantability because there was no proof that the plane was not merchantable. In fact, the proof was that the plane was merchantable, i.e., fit to fly. The plane had been flown fifty hours by Atlantic and about fifty hours by Prashker and his associates, all without any trouble; it was only when the pilot became involved in weather, in which he was incompetent to fly, that there was any trouble. In addition, the model had been tested and certified by the CAB; the very plane involved had been tested and certified by the CAB as airworthy.

III. Choice cannot recover from Atlantic on warranty because it knew of the tail wiggle, the alleged defect in the plane, when it bought the plane on July 21, 1953. Nevertheless, it continued to use the plane until the crash on October 5, 1953.

IV. Choice cannot recover from Atlantic on warranty because it gave Atlantic no notice of breach of warranty. Under Section 49 of the Uniform Sales Act, notice of a claimed breach of warranty must be given promptly. Although Choice knew of the supposed breach of warranty on July 21, 1953, when it bought the plane, Choice gave no notice of a claim for breach of warranty until it brought this suit on September 29, 1954.

V. Choice cannot recover from Atlantic on warranty because it proved no damage for breach of warranty. The damage Choice proved was the difference in value of the plane when it was bought and its value after the crash, when it had been totally destroyed. But under the Uniform Act, damages for breach of warranty are the difference between the value of the thing as it actually was and the value it would have had if it had corresponded to the warranty.

VI. Prashker's estate cannot recover against Atlantic on negligence because Prashker was negligent (1) in taking off, when he was not qualified to fly on intruments and when, at the place of take-off, there was mist, it was raining and the temperature and dew point indicated that the weather would get worse; (2) in flying over Pittsburgh in view of the probability of smoke in that highly industrial area; (3) in failing to turn around when he saw or should have seen the overcast ahead of him and when, instead of turning around, he climbed into the overcast "to get on top" (310a).

VII. Choice cannot recover property damage for breach of warranty since the damage to the plane was due to the negligence of Choice's president Prashker who was using the plane on company business.

VIII. A plaintiff has not been denied his right to trial by jury if the trial court, at the conclusion of the plaintiff's case, directs a verdict for the defendant either (1) because the plaintiff has failed to prove his case or (2) because, in the proof of his case, it affirmatively appears that he is not entitled to recover. In this case, there was complete failure by the petitioners to prove (1) the only negligence charged against this respondent, that it failed to warn of the dangerous characteristics of the Bonanza after it was aware of them or (2) breach of warranty of merchantability. In addition, it affirmatively appeared that the accident was due to Prashker's negligence.

# Argument.

## I. WHEN THERE IS NO ISSUE OF FACT TO BE DECIDED BY THE JURY, THE PLAINTIFF IS NOT ENTITLED TO HAVE HIS CASE GO TO THE JURY.

In the absence of issues raised by the evidence or permissible inferences from the evidence, the plaintiff has no right to trial by jury and "the judge has the right to direct a verdict for the defendant" (Mr. Chief Justice Hughes in *Herron v. Southern Pac. Co.*, 1931, 283 U. S. 91, 51 S. Ct. 383, 75 L. Ed. 857).

*In re Peterson*, 1919, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919:

> "No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined."

*Wilkerson v. McCarthy*, 1949, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (Mr. Justice Frankfurter concurring):

> "It is an important element of trial by jury which puts upon the judge the exacting duty of determining whether there is solid evidence on which a jury's verdict could be fairly based."

Consequently, in order to determine whether the petitioners were entitled to trial by jury as against Atlantic and were deprived of it by the district court, the evidence offered against Atlantic must be examined.

The evidence, both that admitted and excluded, on the issue of negligence, which the petitioners say should have been submitted to the jury, was not offered against Atlantic.

The petitioners' main case was against Beech, the manufacturer. In his opening to the jury, the petitioners' attorney said (5b):

"We are suing two defendants in this case, Beech Aircraft Corporation, the principal defendant, and Atlantic Aviation Corporation, which sold the airplane.

I would like to tell you what our allegations are, what our claims are against both defendants, and I think it would be simpler if I start with Atlantic, since the case against Atlantic is far simpler, far less conclusive than our case against Beech."

The petitioners say here:

"The principal basis for petitioners' claims was evidence of the prior accidents and statistical comparison of failure mentioned above. Aside from being the most important proof of notice to Beech, it was the basis for expert testimony (by the petitioners' expert, Dommasch) that the cause of the Prashker accident lay in the characteristics of the Bonanza * * *." (PP cert. 6)

"The *principal* (italics in petitioners' text) allegation petitioners made was that Beech failed to give necessary warnings of a danger and propensity for structural failure in the Bonanza * * *." (PP cert. 19)

In their petition, the petitioners refer no less than thirty times to the statistics, evidence of other accidents and Dommasch's testimony (PP cert. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 12, 13, 14, 15, 18, 19, 21, 25, 26, 28).

Finally the petitioners conclude their petition (PP cert. 28) by saying, with reference to statistics and reports of other accidents (PP cert. 11a):

"If the right of jury trial is to be guarded against the errosive (sic) effect of labeling obviously admissible evidence 'irrelevant' * * *."

Thus it appears that the petitioners' real complaint is (1) the exclusion of the statistical evidence, (2) the exclusion of the evidence of other accidents, and (3) that

Dommasch's testimony was enough to present a jury question.

### A. The Petitioners' Evidence of "Prior Accidents", Their "Statistics" and Dommasch's Testimony Were Not Offered Against Atlantic.

The petitioners refer here, usually without distinction, to "the respondents", although the charges against each were different and the petitioners' important evidence, according to their own evaluation of it was not offered against Atlantic (e.g., PP cert. 10, 13, 19, 26, 27).[4]

The petitioners complain (PP cert. 10) about the exclusion by the trial court of evidence of prior accidents as irrelevant. They say (PP cert. 11):

> "Indeed, these reports of other accidents were more than relevant to the issue of causation. They were necessary! Asked 'what material do you as an engineer require to analyze the Prashker accident and come to a conclusion on the cause of the Prashker accident,' Mr. Dommasch replied 'a study of similar circumstances or similar occurrences if they exist' (170a). He added, 'this is an essential ingredient to my analysis of the Prashker accident' (171a)."

But the evidence of prior accidents was not offered against Atlantic (87b, 88b, 89b, 95b, 98b, 102b, 103b).

The petitioners complain (PP cert. 13) about the exclusion of statistics offered by them (PP cert. 15):

> "This evidence (the statistics) was probative of the questions of negligence, causation, and contributory negligence, since it demonstrated that it was the airplane and not the pilots that *caused* these accidents,

4. Probably the most striking example of the petitioners' confusion of the two respondents is when they say that the action was brought for "* * * punitive * * * damages against the respondents, the manufacturer and distributor of the airplane (PP cert. 5). The claim for punitive damages was asserted only against Beech (PP cert. 9, 4a).

and since it furnished the basis for expert proof to the same effect. The effect of its shocking exclusion was to deny petitioners their constitutional right to trial by jury." (Italics in text.)

But the statistics were not offered against Atlantic (89b, 179a, 180a, 182a, 183a).

The petitioners say (PP cert. 10) that the court below "ignored the direct testimony * * * of a man whose life work has been devoted to aircraft design (see Dommasch testimony * * *)."

But Dommasch's testimony was not offered against Atlantic (99b, 100b, 103b).

Thus, the three substantial grounds of the petitioners' complaint here are not available against this respondent because the evidence, to which the petitioners refer as creating a jury issue, was not offered against it.

## B. There Was No Proof of Negligence on the Part of Atlantic.[5]

The petitioners say (PP cert. 19) that they proved negligence in (1) failure to warn and (2) negligent design.

### 1. The Evidence of failure to warn, to which the petitioners refer, was not offered against Atlantic.

As to failure to warn, the petitioners commence their argument (PP cert. 19):

> "The *principal* allegation petitioners made was that Beech failed to give necessary warnings of a danger and propensity for structural failure in the Bonanza. The District Court admitted proof of seven prior Bonanza structural failure accidents on the limited issue of notice. It further admitted expert testimony that these reports gave notice of a danger.

5. The heading in the petitioners' petition (PP cert. 18) is: "Failure to prove Negligence and Breach of Warranty". However, there is no reference, whatever, in the following argument to any supposed breach of warranty by Atlantic.

or accident propensity in the Bonanza (248a-251a, 271a, 272a)." (Italics in text)

As already pointed out, the evidence of prior accidents was offered against Beech only (87b, 88b, 89b, 95b, 98b, 102b).

Obviously the petitioners' complaint is against Beech, not against Atlantic.

The petitioners again refer repeatedly to Dommasch's testimony (PP cert. 19). The petitioners fail to point out that Dommasch's testimony was not offered against Atlantic (99b, 100b, 103b).

The petitioners refer (PP cert. 20) to two Beech reports (PX 72 and PX 42) and another report on the Bonanza (PX 22) and say that "the petitioners far exceeded the minimum requirements of proof of negligence" (PP cert. 18).

The petitioners again neglect to point out that these exhibits were not offered against Atlantic on negligence. The petitioners said in their second brief in the Court of Appeals (appendix to this brief):

> "Plaintiffs also offered two engineering reports concerning the Bonanza, prepared by Beech, and one engineering report prepared by the National Advisory Committee for Aeronautics against Atlantic (PX 22, PX 42, PX 72). Plaintiffs conceded that Atlantic had not received or seen these reports prior to the time of the Prashker accident and that they were not admissible on the claims against Atlantic based upon negligence. They offered the reports on the claims for breach of warranty . . . ."

The petitioners refer to Gordon's testimony (PP cert. 20). It was not offered against Atlantic (88b).

Thus, all the evidence, which the petitioners now say proved negligent failure to warn, was not even offered against Atlantic at all or was not offered on this issue.

**2. There was no charge of negligent design as against Atlantic.**

The petitioners, in their opening to the jury, stated (6b) their charges against the respondents. The charge of negligent design was made against Beech only:

> "Against Beech we really make five allegations of negligence and some allegations of more than negligence. We say first that this airplane is improperly designed, that it was improperly designed in its inception."

The Court of Appeals correctly stated the petitioners' charges (PP cert. 3a):

> "* * * Four allegations of negligence are made against Beech: (1) that the airplane was improperly designed, * * *."

The petitioners, in their present argument (PP cert. 22-24), again fail even to suggest that their charge of negligent design does not affect Atlantic.

* * *

To summarize the point, the petitioners say that they have been deprived of their right to trial by jury because they had made out a prima facie case of negligence (1) by their evidence of former accidents, (2) by the statistics as to comparative rates of failure of supposedly similar planes, (3) by the testimony of Dommasch, (4) by PX 22, PX 42 and PX 72 and (5) by proof of negligent design. As to the first three bases of their motion, that evidence was not offered against Atlantic at all; as to the fourth basis of their motion, the three enumerated exhibits were not offered against Atlantic on the issue of negligence; as to defective design, that charge was directed at Beech alone.

Consequently, so far as Atlantic is concerned, there is nothing, on which the petitioners' argument, that they have been deprived of a jury trial, rests.

As a result, Atlantic will not discuss the cases cited by the petitioners (PP cert. 24) on this point.

So far as Atlantic is concerned, the courts below did not err in refusing a jury trial on negligence because the evidence, which the petitioners say entitled them to a jury trial, was not offered against Atlantic.

## II. THE PETITIONERS CANNOT RECOVER ON NEGLIGENCE BECAUSE PRASHKER WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

Atlantic will assume for the moment and contrary to the fact that the evidence, offered against Beech alone, had been offered against Atlantic. Even on that unwarranted assumption, the petitioners could not recover because of Prashker's contributory negligence.

Atlantic suggests that Prashker was negligent in three respects.

First, he took off in the face of bad weather.

Second, he continued to fly directly toward the overcast above Pittsburgh.

Third, he climbed up into the overcast.

### A. Prashker Was Negligent in Taking Off in Rain and Mist.

When Prashker took off he had an 1800 ceiling estimated; the minimum ceiling permitted for a take-off is a thousand feet and a "ceiling" may not be flat; it may have downward projections of five hundred feet (44a).

When Prashker took off, there was light rain and haze; the temperature was fifty, the dew point forty-eight (499); such a situation is an indication that fog, rain or changing weather conditions may be anticipated (122c).

When Prashker took off he had horizontal visibility of four miles; the minimum is three miles.

However, the existence of the minimum ceiling and visibility, like a green light for an automobile, is not a command to go (*Spence v. Waters*, 9 W. W. Harr. 582, 4 A. 2d 142, Del. Super. 1938). "There are many times when it is unsafe for a non-instrument pilot to use the minimums * * *" (Blakemore 45a).

It was negligent for Prashker, a non-instrument pilot, to take off at all when the weather was bad with the prospect of deterioration and when there was already a haze and it was raining (304a).

**B. Prashker Was Negligent in Flying Over Pittsburgh.**

Prashker was negligent in flying directly over Pittsburgh. Atlantic believes that the Court could take judicial notice of the atmospheric conditions over and around the "Smoky City" (45a; *Affiliated Enterprises v. Waller*, 1 Terry 28, 5 A. 2d 257, Del. Super. 1939). Certainly Prashker, who had gone to college in Pittsburgh (21a), who claimed Pittsburgh as his residence (11b) and who had piloted his own planes into Pittsburgh seven times, must have been aware of this fact (113b). But it is not necessary for the Court to go outside the record.

Prashker was specifically warned by the danger of flying over Pittsburgh even after he left the field (310a).

Captain Blakemore, a TWA pilot, thought a prudent person would consider the possibility of smoke or smog over Pittsburgh and was positive (1) that a prudent person would consider that fact in making his plans and (2) that a pilot, leaving Allegheny VFR and flying toward Pittsburgh, where there was instrument weather, would have been aware of the IFR weather ahead of him in time to have avoided it (45a, 46a).

Prashker was negligent both in flying toward Pittsburgh instead of skirting the smoke and fog over the city and in not turning back when he saw or should have seen the instrument weather ahead of him.

**C. Prashker Was Negligent in Climbing Into the Overcast.**

Prashker at 12:22 first stated that he was over the city, unable to maintain VFR and was climbing to get on top of the overcast. After the reply of the tower, telling him to keep clear of airways or get a clearance, Prashker said that he was "already in the —— —— stuff and was climbing." Prashker was dead in about two minutes.

Prashker was negligent in climbing into the overcast when he saw that he could not maintain his visual contact with the ground.

The warning he had received (169c) comes back to mind:

> "ALL THAT WE CAN DO IS TO REPEAT OUR WARNING THAT FLIGHT UNDER INSTRUMENT CONDITIONS BY UNTRAINED OR OUT-OF-PRACTICE PILOTS IS ENORMOUSLY HAZARDOUS AND THAT THE PENALTY FOR THIS TRANSGRESSION OF THE CAA REGULATIONS, AND THE LAWS OF NATURE, IS OFTEN DEATH, NOT ONLY FOR THE TRANSGRESSOR, BUT ALSO FOR HIS FRIENDS WHO ARE WITH HIM." (Emphasis in text).

Prashker ignored the repeated warnings in the literature which he had read and studied (20b-43b); as a result he and his friend paid the ultimate price for his recklessness.

The CAR's are to the effect that a VFR pilot shall stay five hundred feet away from clouds vertically and one thousand feet horizontally. Here there can be no question but that the decision of Prashker to "climb up to get on top" was the cause of his getting lost, losing control of himself, of his plane and crashing (312a).

Any negligence on the part of the plaintiff, however slight, bars his recovery (*Goff v. Borough of College Hill*, 299 Pa. 148, 149 A. 477, 1930, *McDonald v. Ferrebee*, 366 Pa. 543, 79 A. 2d 232, 1951.

One, who fails to use his senses to avoid an apparent dangerous situation, is guilty of negligence as a matter of law (*Miller v. Borough of Exeter*, 366 Pa. 336, 77 A. 2d 395, 1951).

Contributory negligence may consist of careless exposure of one's self to danger or failure to exercise reasonable diligence for one's own protection (*Good v. City of Pittsburgh*, 382 Pa. 255, 114 A. 2d 101, 1955).

One who voluntarily puts himself in a position of danger and injury results is guilty of contributory negligence (*Pollack v. Philadelphia Rapid Transit Co.*, 139 Pa. Super. 256, 11 A. 2d 665, 1940; *Earll v. Wickser*, 346 Pa. 357, 30 A. 2d 863, 1943; *Hall v. Ziegler*, 361 Pa. 228, 64 A. 2d 767, 1949; *Tomey v. West Penn. Ry. Co.*, 300 Pa. 189, 150 A. 612, 1930).

The petitioners say that there is a very strong presumption that the pilot exercised due care for his own safety (PP. cert. 17). There is a presumption of due care on the part of a deceased only when the circumstances surrounding the fatal accident are unknown. (*Rank v. Met. Ed. Co.*, 370 Pa. 107, 87 A. 2d 198, 1952; *Zotter v. Lehigh Valley R. R. Co.*, 280 Pa. 14, 124 A. 284, 1924).

Prashker's negligence in the three enumerated respects prevents recovery by the plaintiffs. There is no presumption of due care on Prashker's part in the face of the direct affirmative evidence as to what he did.

## III. THERE WAS NO PROOF OF BREACH BY ATLANTIC OF AN IMPLIED WARRANTY.

The petitioners do not discuss this point in their petition here.

### A. The Petitioners Did Not Argue Below That, Because of a Breach of Warranty by Atlantic, There Could Be a Recovery for Prashker's Death.

It is agreed that New Jersey law is applicable (PP cert. 9a).

Choice, not Prashker, bought the plane from Atlantic (12b). Therefore, under New Jersey law, only Choice, the party to the contract of sale, can recover on any warranty (*Duncan v. Juman*, 25 N. J. Super. 330, 96 A. 2d 415, 1953). The petitioners did not argue below (appendix to this brief) that Prashker's estate could recover on breach of warranty from Atlantic for Prashker's death. Choice, not the Prashker estate, sued Atlantic for breach of warranty. Choice's only claim for breach of warranty was for property damage.

**B. Choice Did Not Prove a Breach of an Implied Warranty of Merchantability.**

The petitioners do not discuss this point.

Under Section 13 of the Uniform Sales Act, which is in force in New Jersey, the only warranty was a warranty of merchantability, that is, that the plane was reasonably fit for the general purpose for which it was sold (Petitioners' opening to jury, 5b).

Atlantic suggests that the fact that the plane had been flown for a hundred hours by a number of pilots without any trouble demonstrates that the plane was in fact merchantable, i.e., fit to fly.

In addition, the CAA's certification of the type and of the actual plane involved (82b) is evidence that the plane was reasonably fit for flying, the purpose for which it was sold. No evidence was offered against Atlantic, which put in issue the effect of these certificates, introduced by the petitioners themselves that the certification of the Choice plane, that it was "airworthy", is a finding that it is "fit to fly", exactly as "seaworthy" means "fit for a voyage" (Webster).

This was not a res ipsa loquitur situation: the petitioners did not depend on res ipsa (1b) and the doctrine does not apply to a breach of warranty (*Landers v. Safeway Stores*, 172 Ore. 116, 139 P. 2d 788, 1943).

Neither does a warranty make the warrantor an insurer (*Cavenaugh v. F. W. Woolworth Co.*, 308 Mass. 423, 32 N. E. 2d 256, 1941).

There has been no showing that the Choice Bonanza was not reasonably fit for the general purpose for which it was sold. The only showing against Atlantic that the plane was not fit to fly is that this plane was torn to pieces after the pilot lost control of himself and of the plane when he started to climb through the overcast in violation of CAR's (309a-312a) and without regard to the peril of imminent death, which he knew such action involved and of which he had been repeatedly warned (169c).

Choice cannot recover for breach of an implied warranty of merchantability because there was no showing, as against Atlantic, that the plane was not fit to fly.

**C. Choice Cannot Recover on Warranty Because It Continued to Use the Plane After It Knew of the Alleged Defect in the Plane.**

The petitioners do not discuss this point.

Prashker was president of Choice and was on company business when he crashed (5a, 52b). Consequently Prashker's negligence was imputable to Choice.

A warrantee cannot recover if he continues to use the warranted thing after he knows it is unsafe (*Marko v. Sears, Roebuck & Co.*, 24 N. J. Super. 245, 94 A. 2d 348, 1952). WILLISTON SALES, Sec. 207 and 77 C. J. S. 1336, Sales, are to the same effect.

When Choice bought the plane, it was aware of the directional lateral oscillation (tail wiggle), which is supposed to constitute the breach of warranty (20a, 12b, 48b, 51b).

Consequently Choice cannot recover on implied warranty of merchantability because, after it knew of the supposed breach of warranty, it persisted in using the Bonanza.

**D. Choice Cannot Recover on Warranty Because It Gave Atlantic No Notice of Breach of Warranty.**

The petitioners do not discuss this point.

Section 49 of the Uniform Sales Act, which is in force in New Jersey, is as follows:

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

Choice's evidence was to the effect that it knew of the supposed defect in the plane, the tail wiggle, or directional lateral oscillation, which is the basis of the supposed breach of warranty, when it bought the plane on July 21, 1953 (12b, 51b). It gave no notice to Atlantic of any supposed breach of warranty from that time until it commenced this suit on September 29, 1954, about fourteen months after the date, on which it had knowledge of the supposed breach of the warranty.

*Johnson v. Hoffman*, 7 N. J. L. 123, 80 A. 2d 824, 1951, was an action for the price of cattle sold the defendant by the plaintiff. The defendant counterclaimed for breach of warranty but was unable to prove any notice of breach of warranty within a reasonable time. The court said that "where there is no proof of such notice, the Sales Act provides that the Seller shall not be liable" and affirmed the action of the trial court in dismissing the counterclaim.

*Texas Motorcoaches v. A. C. F. Motors Co.*, 154 F. 2d 91 (C. C. A. 3, 1946), involved section 49 of the Uniform Act. Texas sued to recover on a breach of warranty and

recovered. The Court of Appeals reversed because the plaintiff had failed to give the required notice:

> "'The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which rightly or wrongly, the law requires that he shall have early warning (citation) * * *.
>
> Normally, the question of notice is for the jury (citations). However, where the evidence is undisputed and allows one inference only, lack of requisite notice will be determined as a matter of law (citations). Summary judgment on the pleadings will be entered if the facts averred disclose a failure to give requisite timely notice of the breach of warranty as required by section 49 of the Sales Act; Kull v. General Motors Truck Co., 1933, 311 Pa. 580, 166 A. 562."

In the *Kull* case, the Supreme Court of Pennsylvania cited with approval decisions where the courts had held that delays of three months and eight months were too long under section 49 as a matter of law.

*Columbus Axle Co. v. American Automobile Co.* (C.C.A. 6, 1933), 63 F. 2d 206, is to the same effect and holds that where there is no dispute as to the facts, the question of whether notice was given in a reasonable time is for the court.

There being no question but what no notice of breach of warranty was given until suit was brought, as a matter of law the statute's requirement of notice was not met and Choice's claim based on breach of warranty was properly dismissed.

**E. Choice Cannot Recover on Warranty Because It Proved No Damages as a Result of Breach of Warranty.**

The petitioners do not discuss this point.

The damages for breach of warranty are the difference between the value of the thing if it had corresponded to the

warranty and its value as it then was at the time of sale (*Cook v. Rice*, 135 N. J. L. 240, 61 A. 2d 428, Sup. N. J. 1947; *DiRose v. Hunter Lindsay Corp.*, 41 N. J. Super. 17, 124 A. 2d 349, App. Div. 1956; *St. George v. Grisafe*, 38 N. J. Super. 297, 118 A. 2d 835, App. Div. 1955).

On the other hand, the damages for property damage as a result of negligence is the difference between the value of the thing before and after the accident (*Hintz v. Roberts*, 98 N. J. L. 768, 121 A. 711, E. & A. 1923; *Parisi v. Friedman*, 134 N. J. L. 273, 46 A. 2d 808, E. & A. 1946).

Choice proved the cost of the plane when bought (12b) and offered evidence, which, it will be assumed, went to show that the plane was a complete loss after the accident (104b).

Choice, therefore, at the most, offered evidence of what its property damage would have been if its action had been based on negligence. It offered no evidence to prove its damage from the breach of warranty, assumed for the moment. Therefore, it cannot recover on breach of warranty.

## F. Choice Cannot Recover for Breach of Warranty Because Prashker's Negligence Caused the Accident.

Prashker was president of Choice and was flying the plane on company business (5a, 52b). Consequently his negligence was imputable to Choice.

A warrantee cannot recover if his negligence is the cause of the damage to the thing warranted, for which he sues.

*Heath v. Channel Lumber Co.*, 25 N. J. Super. 6, 95 A. 2d 425 (App. Div. 1953):

> "* * * Assuredly the warranty is not a policy of liability insurance, nor does it purport to indemnify the plaintiff against a liability of the plaintiff incurred by reason of his own carelessness (citations) * * *."

77 C. J. S. 1336 is to the same effect.

In the present case, the evidence, offered by Choice, showed that the negligence of Prashker, Choice's president, caused the damage of which Choice complains, a point already taken up under contributory negligence, above.

* * *

To sum up this point, Choice cannot recover on breach of warranty, not only because:

1. Prashker's negligence caused the damage, for which Choice sued, the reason the District Court specifically stated, but also because:

2. There was no proof of breach of the implied warranty of merchantability, i.e., that the Bonanza was not reasonably suited for the general purpose for which it was sold.

3. Choice persisted in the use of the plane after it knew of the supposed characteristic, which it now claims constituted a breach of warranty.

4. Choice gave Atlantic no notice of the claimed breach of warranty.

5. Choice offered no proof of its damages as a result of the supposed breach of warranty.

The courts below did not err in dismissing the claim against Atlantic based on breach of warranty.

## CONCLUSION.

1. The petitioners fail to point out the differences in their charges, and the evidence offered, against Beech and against Atlantic.

2. The Prashker estate cannot recover from Atlantic for damages for Prashker's death for negligence on the basis of the evidence, to which the petitioners refer in their petition, because that evidence was not offered against Atlantic.

3. Since the evidence to which the petitioners refer in their petition, was not offered by them as against Atlantic to show Atlantic's negligence, no issue as between the petitioners and Atlantic was raised by that evidence. Therefore, the petitioners were not entitled, as against Atlantic, to submission of that evidence to a jury. Consequently, there is no basis for the grant of certiorari so far as Atlantic is concerned.

4. Choice sued Atlantic for property damages only on breach of an implied warranty of merchantability. The Prashker estate did not sue Atlantic for Prashker's death on breach of warranty.

5. Choice cannot recover from Atlantic for property damage on breach of an implied warranty of merchantability because:

(a) Choice did not prove that the plane was not merchantable.

(b) Choice continued to use the plane after it knew of its supposed defect.

(c) Choice gave no notice to Atlantic of the plane's supposed failure to comply with the warranty of merchantability.

(d) Choice proved no damages resulting from breach of warranty.

(e) The negligence of Choice's agent, Prashker, caused the accident.

6. Atlantic asks that, as to it, the petition for certiorari be dismissed.

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November 28, 1958

## APPENDIX OF RESPONDENT, ATLANTIC AVIATION CORPORATION.

### (Excerpts From Petitioners' First Brief in the Court of Appeals).

9 * * *

"(B) As to breach of warranty:

The plaintiffs asserted claims, based upon breach of warranty, against both defendants. Since the sale of the aircraft from Atlantic to Choice took place in New Jersey, that state's law govern d questions of warranty as between Choice and Atlantic. It was agreed that New Jersey law required privity of contract to support an action for breach of warranty. Thus, the only action asserted at the trial against Atlantic, based upon warranty, was the claim for property damages as a result of loss of the aircraft. * * *"

44 * * * *

"In directing a verdict in favor of the defendant, Atlantic, on the action by Choice based upon breach of warranty for the value of the airplane, the Court said * * *."

### (Excerpt From Petitioners' Reply Brief in the Court of Appeals).

15 * * *

"Plaintiffs also offered two engineering reports concerning the Bonanza, prepared by Beech, and one engineering report prepared by the National Advisory Committee for Aeronautics against Atlantic (PX 22, PX 42, PX 72). Plaintiffs conceded that Atlantic had not received or seen these reports prior to the time of the Prashker accident and that they were not admissible on the claims against Atlantic based upon negligence. They offered the reports on the claim for breach of warranty (331a, 332a, 336a-339a). * * *"

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 476

GOLDIE B. PRASHKER, Executrix of the Estate of Nathan Prashker, deceased, and CHOICE EMBROIDERY & LACES, INC., *Petitioners,*

v.

BEECH AIRCRAFT CORPORATION and ATLANTIC AVIATION CORPORATION, *Respondents.*

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT BY JEAN C. CLEMINSHAW, INDIVIDUALLY, AND AS WIDOW OF JAMES M. CLEMINSHAW, AND AS TRUSTEE AD LITEM FOR ALL PERSONS ENTITLED TO SHARE IN THE ESTATE OF JAMES M. CLEMINSHAW, DECEASED**

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PRESS OF BYRON B. ADAMS, WASHINGTON, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

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No. 476

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GOLDIE B. PRASHKER, Executrix of the Estate of Nathan Prashker, deceased, and CHOICE EMBROIDERY & LACES, INC., *Petitioners*,

v.

BEECH AIRCRAFT CORPORATION and ATLANTIC AVIATION CORPORATION, *Respondents*.

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**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT BY JEAN C. CLEMINSHAW, INDIVIDUALLY AND AS WIDOW OF JAMES M. CLEMINSHAW, AND AS TRUSTEE AD LITEM FOR ALL PERSONS ENTITLED TO SHARE IN THE ESTATE OF JAMES M. CLEMINSHAW, DECEASED**

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Jean C. Cleminshaw, individually and as widow of James M. Cleminshaw, and as Trustee ad litem for all persons entitled to share in the Estate of James M. Cleminshaw, deceased, respectfully moves for leave

to file a brief amicus curiae in the above captioned cause. The consent of all of the parties in the above captioned cause to the filing of a brief amicus curiae was sought. The attorneys for the Petitioners consented by letter dated November 4, 1958. The attorneys for the Respondent, Beech Aircraft Corporation, originally consented but subsequently withdrew this consent. The attorneys for the Respondent, Atlantic Aviation Corporation, refused to consent to the filing of such a brief.

Your Movant is the plaintiff and the Respondent Beech Aircraft Corporation is the defendant in Civil Action No. 1667 now pending in the United States District Court for the District of Delaware wherein your Movant (plaintiff therein) claimed damages for her decedent's wrongful death caused by Beech Aircraft Corporation's negligence in the manufacture of its airplane and its failure to warn prospective users of certain dangerous qualities and characteristics thereof.

Your Movant's decedent was killed December 4, 1953, while a passenger in Beecheraft Bonanza N2181D, as the result of a structural in-flight failure which occurred under circumstances similar to and in the immediate vicinity of but approximately three months after Petitioners' decedent's fatal tragedy. The Bonanzas involved in both tragedies were of the same year, type and model. Your Movant's decedent's plane, at the time of the structural in-flight failure, was being piloted by an experienced and duly licensed professional pilot rated to fly private and commercial, single and multiple engine aircraft visually and under instrument conditions. He also carried an instructor's license in these categories.

The Appellate Court's decision and opinion and the trial court's directed verdict are contrary to the Seventh Amendment to the Constitution and other decisions within and without the Third Circuit. If not reversed they will arbitrarily deprive your Movant as well as other plaintiffs under similar circumstances to a trial by jury as guaranteed by the Seventh Amendment to the Constitution.

Wherefore, it is respectfully requested that this Court grant your Movant leave to file herein a brief as amicus curiae.

Respectfully submitted.

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## NOTICE OF MOTION

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PLEASE TAKE NOTICE that on the 12th day of November, 1958, the undersigned will file the above Motion and accompanying Brief in the office of the Clerk of the Supreme Court of the United States, said

Motion to be considered at the convenience of the Court.

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IN THE

# Supreme Court of the United States

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## BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT OF JEAN C. CLEMINSHAW, INDIVIDUALLY, AND AS WIDOW OF JAMES M. CLEMINSHAW, AND AS TRUSTEE AD LITEM FOR ALL PERSONS ENTITLED TO SHARE IN THE ESTATE OF JAMES M. CLEMINSHAW, DECEASED

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### INTEREST OF THE AMICUS CURIAE

Jean C. Cleminshaw is the widow of James M. Cleminshaw who was killed December 4, 1953 as the result of a structural in-flight failure of a Beechcraft Bonanza of the same type, model and year as that involved in the instant case. At the time of his death, James M.

Cleminshaw, the father of three children, was one of three passengers in a new Bonanza enroute from Columbus, Ohio, to Hartford, Connecticut. The plane was piloted by an experienced, professional pilot who was licensed to fly private and commercial, single and multiple engine aircraft under both visual and instrument flight conditions. The structural in-flight failure occurred in the vicinity of Harrisburg, Pennsylvania. All persons aboard were killed. If the Prashker Bonanza was the 46th Bonanza structural in-flight fatal accident (See Petitioners' Brief, p. 5), the Cleminshaw incident, which occurred three months after the Prashker fatality, was the 47th.

This Amicus Curiae filed Civil Action No. 1667 in the United States District Court for the District of Delaware against the Respondent Beech Aircraft Corporation wherein she claimed damages for her decedent's wrongful death caused by said Respondent's negligence in the manufacture of its airplane and its failure to warn prospective users of the dangerous characteristics and qualities thereof. Civil Action No. 1667 is presently pending and awaiting the final determination of the instant cause.

The affirmance by the Third Circuit Court of Appeals of the trial court's directed verdict on grounds set forth in its opinion—if not reversed by this Court—will automatically deprive this Amicus Curiae and any other plaintiff who questions the design and dangerous characteristics (known to the manufacturer but unknown to the user) of an aircraft to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

## ARGUMENT

The decisions below are contrary to the Seventh Amendment to the Constitution of the United States which says:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

Those decisions are contrary to the Seventh Amendment because the courts below determined factual issues which should have been relegated solely to the jury. This deprived the Petitioners, and will deprive other plaintiffs in the same situation, of their constitutional right to trial by jury.

The Appellate Court recognized its constitutional limitation, and the limitation of the trial court, on the question of *contributory negligence* when it said:

> "A decision based on Prashker's contributory negligence alone would depend on a preliminary holding that the evidence would not support an inference that bad weather may have closed in on him even though he was exercising due care for his own safety. We incline to the view that no such inference is available, but concede that *the question may be arguable.*" (Italics supplied) (258 F. 2d 602; 606; Appendix 7a of Petitioners' Brief)

But on the question of *primary negligence*—even though the same constitutional limitation was applicable; even though the Seventh Amendment, on the evidence adduced, required a jury determination thereof—it cast aside this constitutional restriction and arbi-

trarily decided ". . . no negligence can be imputed to the defendants." (258 F. 2d 602, 606; Appendix 7a of Petitioners' Brief) In order that it might reach this arbitrary conclusion the Appellate Court, contrary to the Constitution, determined the following factual issues in the following manner:

1. Was the Bonanza improperly designed because

A. The model is subject to a lateral oscillation of some two or three degrees on either side of a norm in rough air flight, and that this oscillation induces vertigo whenever visual references become unavailable?

The Appellate Court (258 F. 2d 602, 606; Appendix 7a of Petitioners' Brief) answered that factual question NO because "any aircraft under similar flight conditions is subject to *some* lateral oscillation." (Italics supplied)

*The evidence adduced warranted a jury—not a court—determination.*

B. The plane tended to assume a nose-down attitude and once in that position accelerated dangerously?

The Appellate Court (258 F. 2d 602, 606; Appendix 7a of Petitioners' Brief) answered that factual question NO because "any airplane certificated by the C.A.A. as was the Bonanza must be statistically stable."

*Certification by C.A.A. does not give absolution to the manufacturer on all questions of negligence. C.A.A. regulations set the minimum requirements. They do not determine the standard of care.*

C. It should have been equipped with dive brakes?

The Appellate Court (258 F. 2d 602, 606; Appendix 8a of Petitioners' Brief) answered that

factual question NO because "Beech had in fact considered the use of dive-brakes but had abandoned the idea largely because much the same result could be achieved by extending the landing gear."

*Much the same result could not be achieved by extending the landing gear because extension of the landing gear at high speeds would—of itself—cause a structural failure. The Beech Aircraft Corporation Bonanza Manual (plaintiffs' Exhibit 18 in the trial court) states specifically that the maximum safe speed for extension of the landing gear is 125 mph. This is repeated at page 59 of the Beechcraft Bonanza 1953 Handbook (plaintiffs' Exhibit 17 in the trial court).*

D. The stick-loads were dangerously light?

The Appellate Court (258 F. 2d 602, 606; Appendix 8a of Petitioners' Brief) answered that factual question NO by saying "the Bonanza's stick-loads exceeded those imposed by the military for their aircraft designed to perform more violent maneuvers than is the Bonanza."

*The safety requirements for military and civilian aircraft are not comparable and compliance by one with the minimum requirements set by the other does not necessarily satisfy the standard of care required.*

2. Was there a duty on the part of Beech to warn of the Bonanza's dangerous characteristics?

The Appellate Court (258 F. 2d 606, 607; Appendix 8a of Petitioners' Brief) answered that factual question NO because "Even if it can be said that there was a duty to warn of the dangers in exceeding the inherent restrictions in any aircraft, that duty was adequately discharged by the warnings to avoid instrument flight conditions.

which would be the only anticipatable way the restrictions could be unintentionally exceeded by a pilot."

*"Beech has never, but probably should have, publicized its Bonanza as a VFR or "fair weather" plane only. Although Prashker did not have an instrument rating, the pilot in the Cleminshaw tragedy was a professional pilot with more than 2100 hours of pilot experience. He was licensed to fly commercial as well as private aircraft and he had an instrument rating. A substantial number of the pilots in the 46 (as of the date of the Prashker tragedy and 79 as of December 31, 1957[1]) fatal structural in-flight Bonanza failures were instrument rated pilots. Were they, too, supposed to avoid instrument flight conditions? If they were, there was no evidence anywhere of such warning by Beech.*

Each and every one of the foregoing determinations by the court was based on factual issues. The questions involved were such that, based on the evidence, reasonable men might arrive at differing answers. Under the Constitution, the decided cases of this Court, other circuit courts of appeals and prior decisions within the same circuit, those factual issues should have been determined by the jury.

*Schulz* v. *Pennsylvania R. Co.*, 350 U.S. 523; 100 L. Ed. 668.

*Thomas* v. *Conemaugh & Black Lick Railroad Company* (1956, 3rd C.C.A.) 234 F. 2d 429, 432.

*Doggett* v. *Atlantic Holding Corporation* (1956, 4th C.C.A.) 239 F. 2d 156, 159.

*North American Aviation, Inc.* v. *Hughes* (1957, 9th C.C.A.) 247 F. 2d 517; cert. den. 355 U.S. 914; 2 L. Ed. 2d 273.

[1] Petitioners' Brief, p. 3, footnote 1.

## CONCLUSION

So that the Constitution and the right to trial by jury thereunder shall be preserved, this Court should grant the Petitioners' writ and eventually reverse the Appellate Court.

Respectfully submitted,

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Office Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1958.

## No. 476.

GOLDIE B. PRASHKER, Executrix of the Estate of Nathan Prashker, Deceased, and CHOICE EMBROIDERY & LACES, INC.,

*Petitioners,*

*v.*

BEECH AIRCRAFT CORPORATION and ATLANTIC AVIATION CORPORATION,

*Respondents.*

## BRIEF OF BEECH AIRCRAFT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1958

No. 476.

GOLDIE B. PRASHKER, EXECUTRIX OF THE ESTATE OF NATHAN PRASHKER, DECEASED, AND CHOICE EMBROIDERY & LACES, INC.,

*Petitioners,*

*v.*

BEECH AIRCRAFT CORPORATION AND ATLANTIC AVIATION CORPORATION,

*Respondents.*

## BRIEF OF BEECH AIRCRAFT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### A. OPINIONS BELOW.

The Opinion of the Court of Appeals for the Third Circuit has now been reported and is found at 258 F. 2d 602.

### B. QUESTION PRESENTED.

The only question presented by the record is whether in this action for negligence, the Court of Appeals has sanctioned a denial of petitioners' right to a jury trial in:

(a) Upholding a directed verdict for Respondents (defendants below) where Petitioners' (plaintiffs below) own evidence conclusively established the

contributory negligence of Prashker (petitioners' decedent) (a complete defense under the applicable Pennsylvania law) and failed completely to establish any negligence on the part of either Respondent; and

(b) Ruling that, in the light of the fact that all airplanes, when subjected to excessive stresses, will disintegrate in the air in the same manner and for the same reasons as the Prashker airplane, and in the light of the fact that all kinds of airplanes are at times subjected to such stresses and do similarly disintegrate, and in the light of other factors, evidence of such accidents does not tend to prove the existence of a design defect.

We do not agree that question 3 set forth in the Petition for Certiorari (p. 3) raises a question for review, since the lower courts did not reach this question at all. We do agree, however, that if the Petition for Certiorari were granted, the question of the effect of the approval and certification of the airplane by the CAA would have to be briefed and argued on the merits since we contend that the judgments of the lower courts are sustainable on this ground.[1]

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1. The judgment should not be reversed if there is any ground upon which it can be sustained even though not passed upon by the court below. *U. S. v. American Ry. Exp. Co.*, 265 U. S. 425, 435, 44 S. Ct. 560, 68 L. Ed. 1087 (1924); *Bullen v. DeBretteville*, 239 F. (2d) 824 (9th Cir. 1956); *Baric v. Superior Tanning Co.*, 182 F. (2d) 724 (7th Cir. 1950).

## C. COUNTER-STATEMENT OF THE CASE.

### 1. Introduction.

By the very nature of the way petitioners have presented their Statement of the Case it is impossible for this Respondent, without a full Counter-Statement to correct inaccuracies and omissions therein.

This is an action for the destruction of a Model D Beech Bonanza airplane and the death of its pilot, who was the president of a family corporation which had purchased and owned said plane for use in its corporate business. The principal damages sought are under the Pennsylvania Survival Act, and are based primarily on the loss of substantial earnings of the decedent.[2]

The basic contention of petitioners in this case is that the fundamental design of the Bonanza model airplane is unsafe, and that it was this unsafe design coupled with a failure to warn, that caused Prashker to lose control of the airplane when, although he was not capable of flying on instruments, he piloted the plane into instrument weather conditions. There is no claim that any of the plane's materials were defective (80b) or of insufficient strength (8b), or that the plane in any way violated any of the voluminous requirements of the CAA and CAB which govern its design, manufacture, and sale (8b, 70c).

Petitioners place their principal reliance upon tendered proof that the airplane has suffered previous accidents when some of the pilots lost control of the airplane in adverse weather conditions, and upon tendered statistical proof

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2. Petitioners refer to their action for wrongful death (Pet. p. 5). However, it was conceded by their attorney that no damages had been shown under this part of their claim (165c). No proof of funeral expenses was ever made. ("Pet." refers to Petition for Certiorari. Page references accompanied by letters are to the appendices filed in the Court of Appeals, e.g., 165c. Letter "a" refers to Petitioners' Appendices; letter "b" refers to Respondent Atlantic's Appendix; letter "c" refers to this Respondent Beech's Appendix.)

relating to alleged comparative rates of failure. Petitioners contend that this data demonstrates a special danger in the Model D Beech Bonanza. The tendered proof, although perhaps plausible to one who has not flown an airplane and is not familiar with aeronautics and flying conditions, is without probative merit when considered against the background of flying hazards and aerodynamic theories and practices which underlie this case and were presented to the courts and jury below. And the tendered proof has no bearing whatsoever upon the principal ground of decision in both lower courts—the conclusive showing of decedent's contributory negligence.

This case involves primarily flying conditions of which only flyers have a first hand knowledge and understanding. It can be understood only in the light of testimony by such flyers, and in the light of conceded aerodynamic theories and practice.

Because of the emphasis placed by petitioners upon matters that are apt to be misunderstood by those not familiar with the risks and conditions of flight we are compelled to describe the circumstances of this accident in full and to state the aeronautical principles which underlie this entire case, and which were clearly presented by petitioners' own witnesses to the Court and jury below.[3]

## 2. Airplane Design Necessarily a Compromise.

As the Court of Appeals recognized in its opinion (Pet. 11a) a commercial airplane is essentially a compromise (8b, 29b-30b, 32b, 35b). Since an airplane must be light enough to get off the ground, and to travel with desirable speed, the strength of its parts must be limited. On the other hand, it must be strong enough to withstand stresses up to a pre-

3. In a desperate effort to bolster their case, petitioners have repeatedly gone outside the record and inserted extraneous matter to influence the Court. Glaring examples of this patent abuse are found in the Petition p. 3 (footnote 1), p. 25 (reference to accidents as to which no proof was tendered by petitioners).

determined limit, and to carry the loads for which it is designed. The skill of the aerodynamicists has not yet devised (and probably never will devise) an airplane light enough to provide efficient transportation which cannot literally be torn apart in mid-air when subjected to strains caused by the pilot's loss of control of the airplane in adverse weather conditions (187a-188a). This danger is especially present when a pilot not qualified to fly on instruments attempts to fly in weather conditions where instruments must be used.

These considerations were readily conceded by petitioners' own attorney in his opening remarks to the jury, where he stated:

> ". . . You can tear the wings off any airplane flying if you put it in a dangerous position, exert extreme loads on it. There isn't an airplane flying that you can't tear apart. And that includes a DC-6, a Constellation, any airplane that one of you may have flown in. You can take the wing off, if it gets into a critical flying attitude, if loads are exerted upon it in excess of what it will stand. *That doesn't mean that those airplanes are not sufficiently strong or that they are badly designed. Any airplane is a compromise.* It can't be too heavy because then it would not fly anything (sic), and things of that sort. . . ." (Plaintiffs' opening, 8b) (Emphasis supplied.)

The evidence subsequently introduced by petitioners (respondents called no witnesses, since there was a directed verdict at the end of petitioners' case) emphasized and reemphasized the fact that, as all pilots know, any airplane can be torn apart in the air if excessive loads are imposed on it. As the case unfolded, it became clear that structural failure in midair was most likely to occur when a pilot not qualified to fly on instruments entered instrument weather ("blind flying") conditions. Loss of control of the air

plane is virtually inevitable under such circumstances, and there usually ensues the imposition of excessive loads in an effort to regain control.

To "assure the highest degree of safety" in air transportation (49 U. S. C. §402) the CAA and CAB have been given by Congress broad, almost dictatorial, power over air transportation including, among other things absolute control of the "design, materials, workmanship, construction, and performance of aircraft, aircraft engines and propellers, as may be required in the interest of safety". (49 U. S. C. § 551(a)(1). See also 49 U. S. C. § 425(a)). A model design such as the Beechcraft Bonanza is not approved by the CAA until the completion of many months of extensive and searching testing, examination and supervision, beginning with the drawing board and ending with the final test flights (82b, 81a-82a, 24c) Contrary to the impression sought to be given in the Petition for Certiorari (pp. 4, 27-28), the issuance of a type certificate not only certifies to compliance with the applicable civil air regulations, it is also official evidence "That the Administrator finds no feature or characteristics of the airplane which renders it unsafe for the category in which it is certificated" (14 C. F. R. §§ 3.10 and 1.12; 25c-26c; see also 23c, 87c-88c). Furthermore, the CAB has ample authority to revoke a type certificate if it afterwards finds the plane to be unsafe (49 U. S. C. § 553; 14 C. F. R. § 1.16; 40c).

A type certificate was issued for the model D-35 the plane type involved in this action (124b). Moreover, the particular plane involved in this action was individually tested in accordance with CAA regulations (14 C. F. R. §§ 1.30-1.64) and an airworthiness certificate was issued for this plane (86b). A special board convened by the CAA found that the Bonanza type airplane was no more difficult to fly on instruments than other similar aircraft (36c, PX 35). Also, the National Advisory Committee for Aeronautics (NACA) test flew the airplane and issued a report

concluding that the airplane was a satisfactory airplane (PX 22; see 52c). Although the CAB has investigated the Bonanza crashes and examined the NACA report it has never deemed it necessary to revoke the type certificate (37c).

### 3. Instrument Flying (Weather Flying) and Vertigo.

Vertigo, as it applies in this case and to aviation, is a special type of disorientation in space which occurs when the pilot loses all visual frame of reference. When a pilot gets into the clouds or overcast he loses sight of the ground and the horizon, and is confronted with faceless gray matter in every direction (128c-129c). Being airborne, his other senses cannot tell him whether he is flying straight, whether he is flying level, whether he is flying to the right or left or whether he is in a sharp turn and a spiral dive (128c-129c); in fact, his senses will deceive him. The disorientation that ensues is called vertigo. It happens regardless of what type of airplane is involved when a pilot unqualified to use instruments loses his visual frame of reference (162c-163c).

A clear and amusing description of this "aerial vertigo" is found in a United States Navy Booklet (NAVAER 09-80Q-33) which was furnished by Beech to all Bonanza purchasers (including decedent in this case) and is a part of Beech's regular safety program (the pamphlet entitled "Vertigo Sense," a part of Beech's Exhibit No. 4, at 171c).

Instruments have been devised to enable pilots to fly through clouds and the overcast with reasonable safety, but they can be interpreted and used properly only after intensive and prolonged training, and even then only when proficiency is kept up by current practice in the type of plane to be flown (32b-35b). The pilot must be disciplined to ignore and reject what his senses are telling him and to accept unquestionably the evidence of his instruments. Moreover it takes considerable training and continuous practice to learn how to interpret and react to the instruments.

The testimony and the exhibits show what will happen to a pilot who tries to fly on instruments without instrument training or without experience in the airplane which he is flying (36b-39b; PX 13, the pamphlet "G's", at 168c). The pilot may get involved in a procedure known as "chasing instruments". Because of the lag between the reading of the instruments and the actual position of the airplane the airplane gets on a course similar to that of a roller coaster which results in enormous strains being placed upon it, particularly in the dive phase. Or the pilot may get into a power spiral which also puts dangerous loads on the airplane. In either case the probable result is disaster, since excessive loads on the aircraft structure will result in a mid-air disintegration.

Indeed, it is so hazardous to attempt a flight under instrument conditions (i.e., where the pilot has no visual frame of reference) without adequate training that it is made specifically illegal by appropriate Civil Air Regulations (14 C. F. R. § 43.65; see also 14 C. F. R. §§ 60.40-60.49) and any pilot who attempts instrument flight without first completing the proper training, is in violation of the law (46a).

Captain Blakemore, a TWA pilot with approximately 10,000 hours of flying time, and the only pilot called by plaintiffs to testify, stated that if a pilot unqualified to fly on instruments gets involved in instrument weather, there is no question but that he will lose positive control of the airplane and that "regardless of what happens from that point on, only a miracle is going to save him from some type of harm" (46a).

### 4. "Clean" and "Dirty" Airplanes.

The Beech Bonanza involved in this case is what is known as a "clean" airplane. This means a fast, streamlined airplane with a low amount of drag (18b). "Cleanness" is desirable in airplanes because it results in more economical rapid transportation.

One of the common difficulties experienced by an unqualified pilot who gets into instrument conditions is for the airplane to get into a dive, with the result that attempts to lower the speed of flight produce excessive loads on the airplane's structure and may result in attitudes of the airplane difficult to manage on instruments (17b; PX 6). "The rapidity with which such hazards increase is more pronounced as the cleanness of the airplane increases" (17b; PX 6). A clean airplane will pick up airspeed very quickly without the nose being pushed down very far (36b-37b; 42b). On the other hand, a clean airplane affords added safety in certain other situations (124c-125c).

**5. Knowledge of Prashker and Warnings by Beech.**

The record is replete with evidence, all undisputed, of warnings by Beech of the dangers inherent in flying a clean airplane in instrument weather conditions. Actually, Prashker had already been apprised of most of this material in the course of his flying training, and so Beech was repeating and re-emphasizing points of which he was already aware.

Thus Prashker was warned, as he indeed already knew, that all airplanes are a compromise, and that any plane might be pulled apart if an unqualified pilot subjected it to stresses and strains through loss of control of the airplane in instrument weather (22b-26b, 29b-32b, 35b). He knew and was warned by Beech of the particular dangers involved in flying in instrument weather by a pilot unqualified to fly on instruments, including the dangers of vertigo (17b, 25b, 32b-33b, 34b-35b, 36b-38b; see PX 6, 7, 8, 13, 17 and 18). A vast amount of safety literature embodying this material had been supplied to Prashker by Beech (13b-15b) pursuant to an extensive safety program undertaken by Beech at its own expense (119c) unparalleled anywhere in the industry (186a). In addition to pointing out the dangers involved when an unqualified pilot attempts to fly in instrument

conditions, this literature emphasized the exceptional danger involved where the plane is aerodynamically clean (17b, 36b-37b, 41b-42b). Indeed, Prashker was specifically aware of the characteristics of clean airplanes as he had had considerable previous experience with airplanes (10b) and was making the typical pilot's natural progression from slower, "dirty" planes to faster, "cleaner" ones (46b).

Prashker was not qualified to fly an airplane on instruments and he knew it (18a-19a). In fact, Prashker admitted over the radio in what were virtually his last words before the crash that he was not "capable of flying instruments" (302a).

### 6. The Accident.

On October 5, 1953 at 12:09 P. M. Prashker took off from the Allegheny County Airport bound for Cleveland, Ohio on a business trip, accompanied by Harold Weissman. At the time, the ceiling at Allegheny was "estimated" (304a) to be 1800 feet above the ground and the visibility was 4 miles (304a). The weather report showed haze, light rain, temperature 50° and dew point 48° (PX 26; 304a). Prashker nevertheless filed a visual flight rules plan (VFR) which, as we show in our argument (*infra* pp. 23-24) would have taken him within 50 feet of the "estimated" ceiling, and if followed would have constituted a clear violation of law.

The available evidence of the ensuing flight and crash is effectively presented in the coldly objective pages of the Incident Report (PX-26) prepared by the CAA (300a-313a). The statement of the Controller in the Allegheny Tower (309a-312a) summarizes this evidence:

> "1207E Bonanza N2168D called Allegheny Tower by radio and requested taxi and take-off instructions. I cleared Bonanza 68D to taxi Runway 5 or 30, pilot's choice, wind North 10 to 15 and Altimeter 30.00. Bonanza 68D asked for Runway 30 and for detailed instructions as he was unfamiliar with the field. I

issued detailed instructions to Bonanza 68D. Controller Armstrong, who was working the Flight Data Position, required me to find out if N68D would close his flight plan with Cleveland Radio. I requested this information from N68D and the pilot advised that he would close with Cleveland Radio.

"1209E Bonanza 68D requested take-off clearance and I cleared him for take-off on Runway 30. The take off appeared normal in all respects. The aircraft was last observed on a straight out departure about 3 miles Northwest of the field and I advised him to use caution passing through the Greater Pittsburgh area *as they have considerable instrument traffic.*

"1222E to 1226E Bonanza 68D called Allegheny Tower and advised that he was over the city at 2300 feet, *unable to maintain VFR and was climbing to get on top.* I advised N68D that the last tops we had were 3800 feet and suggested that if he was climbing to remain well clear of all airways or get an ATC clearance. The pilot advised that *he was already in the G— D— stuff and was climbing.* Controller Armstrong advised me that Greater Pittsburgh Tower advised that a Jet reported the tops at 33,000 feet and they had nothing on in-between layers. I relayed this to N68D. I then requested the approximate position that N68D was climbing up and he replied that he did not know his position. I then requested of the pilot if he desired to return to the airport, to which the pilot replied that he would, but did not know where he was except that *he had entered the G— Dam— stuff over the city. I asked N68D if he was capable of flying instruments and the pilot replied that he was not qualified.* I then asked N68D if he was VFR and the pilot replied *NO, I cannot see a G— D— thing in this s—.* Controller Armstrong advised me to have the pilot count for a DF steer for Pittsburgh Tower. I did and the pilot counted. Con-

troller Armstrong advised me that Pittsburgh Tower said to steer 225 degrees magnetic. I relayed this heading to N68D. I heard a carrier signal on the radio and then a very crackly voice first which was barely distinguishable and then 2 5. I repeated the steer, but received no acknowledgment. I transmitted to N2168D on all available frequencies in an attempt to reestablish contact with the aircraft but was unsuccessful.

"1228E Controller Armstrong answered the outside telephone and then advised me that a Mrs. Fine reported seeing an aircraft go down between Elizabeth and Monongahela.

* * *

"From the pilot's conversation it was very evident that he was excited and under considerable pressure after he advised that he was in the overcast and throughout the short period that we had radio contact with him.

IVAN L. McCAFFERTY
Ivan L. McCafferty
Airway Operation Specialist"

(Emphasis supplied.)

The plane crashed about 8 miles south and slightly east of Allegheny (63a, 76a). A wing and a stabilizer had come off the plane under positive, upward pressure (61a, 72b, 76b). An examination of the plane after the crash showed that the flaps had not been let down and that the landing gear had not been lowered (21c, 73b), despite warnings Prashker had received to take such precautions (25b, 31b). The examination also showed that Prashker had been flying with the plane trimmed for a slightly nose down attitude (76b-77b).

## D. SUMMARY OF ARGUMENT.

### I.

Two lower courts sustained the granting of a directed verdict on the ground that fair-minded jurors could not honestly differ that there was contributory negligence which would bar recovery under the applicable Pennsylvania law. The lower Courts, in so holding, clearly applied the proper test in determining whether there was sufficient evidence for the jury, basing their conclusions upon review of a voluminous and highly complicated record. This Court has held, particularly in diversity cases, that where two lower courts have agreed that the evidence of contributory negligence, and the inferences properly to be drawn therefrom, do not warrant submission of such issues to the jury, this Court will accept those findings in the absence of plain error. No such plain error is shown in this case, and therefore, no violation of the Seventh Amendment exists in the direction of the verdict.

### II.

### The Directed Verdict Was Clearly Correct.

(a) As to contributory negligence, it is agreed by all parties that the plane was torn apart when Prashker lost control of the plane in an overcast. Prashker's negligence in getting into the overcast was clearly shown by a take-off in the face of marginal weather which was threatening to get worse, adoption of a flight route which would take him over the City of Pittsburgh where instrument conditions were likely to prevail, failing to turn around in time to avoid the instrument weather, attempting to climb through the overcast, and failing to lower landing gear and flaps when he first got into instrument conditions. The negligent character of these acts was established by Petitioners' own expert testimony, by Prashker's violation of applicable Civil Air Regulations and by evidence of Prashker's dis-

regard of specific warnings from the respondent Beech. When these are all considered together, the overwhelming picture of Prashker's negligence is gross and shocking.

Petitioners' argument that contributory negligence was not conclusively established because the evidence is consistent with the theory that Prashker found himself trapped in bad weather is refuted by the only expert testimony elicited by Petitioners, which was that Prashker could have seen the weather in time to avoid it, and that bad weather does not close in around a pilot so that he is trapped, if he is exercising due care for his own safety. The District Court specifically ruled that an inference that Prashker had become trapped when the weather closed in around him was not justified on the record and the Court of Appeals took the same view.

Since the subject matter is not within the experience of the ordinary juror, expert testimony controlled this point. In the absence of anything to the contrary this testimony must be taken as conclusive.

(b) As to negligence, petitioners claim a combination of three factors which made the plane especially hazardous to an unwary pilot and a failure to give warning of the alleged special hazards. These three factors are (1) oscillations which allegedly induce vertigo in a pilot; (2) alleged light stick forces which allegedly increase the danger of structural failure; and (3) alleged extremely rapid acceleration in a nose down (dive) position.

As to the oscillations and vertigo, petitioners' testimony shows that vertigo is likely to have occurred regardless of the oscillations. Furthermore, petitioners failed completely to produce a competent expert to establish that the oscillations would produce vertigo, and failed to produce any evidence whatsoever to show that the oscillations were more likely to produce vertigo than oscillations which occur in other airplanes. The only expert produced by petitioners testified about motions in a barany chair and was

unable to state whether or not those motions applied to an airplane. When requested specifically on cross-examination to assume conceded facts about the oscillation characteristics of the Bonanza, *he in effect testified that the oscillations would not produce vertigo.*

As to the claim of light stick forces, there is not a single shred of testimony anywhere in the record to convict these stick forces as a contributing factor to the accident. The only evidence in the record shows heavier stick forces than were required by all available criteria.

As to the rapid accelerations in a nose down position, this characteristic is common to all clean airplanes of high performance, like the one here involved. The ability of this plane to accelerate rapidly in a nose down position was known to its pilot. Documents admittedly sent by Beech to Prashker and admittedly read and discussed by Prashker contained warnings specifically directed to this feature of the airplane. Prashker's own brother testified that Prashker was aware of it.

## III.

The evidential rulings as to prior accidents and statistics were correct. The evidence which was refused would not have enabled petitioners to make out a case.

(a) Evidence of prior accidents could not have affected the rulings on contributory negligence. Nor would such evidence have added anything to petitioners' case on the question of negligent design. Petitioners' aerodynamicist was unable to deduce from these accident reports anything more than "a set of circumstances that could get a pilot into very serious trouble."

The prior accidents invariably involved pilots unqualified to fly in instrument conditions, or qualified pilots who flew into conditions of turbulence unlike those of the present case, which are dangerous for any pilot in any plane. In view of the impossibility in the present state of the art of designing an airplane which will take an unqualified pilot

through instrument conditions in safety, the evidence of the prior accidents could not serve as notice or evidence of a dangerous condition beyond that inherent in the design limitations of the airplane and of which Prashker was duly warned.

(b) Similarly evidence of the statistics could not have affected the rulings on contributory negligence nor added anything to petitioners' case on the question of negligent design. After all, the statistics are merely a summary of the accident reports.

The comparisons with other aircraft have no factual basis.

First, the comparison includes airplanes (such as the Piper Cub) which were not designed for and do not fly cross-country and are not of clean design. These airplanes would rarely, if ever, be in a position where they might get involved in weather conditions, and on the rare instances that this might happen their "dirty" design would tend to prevent excessive dive speeds. In point of fact, statistically the Bonanza compares favorably with several other models of clean design.

Second, petitioners are lumping the original model 35 Bonanza and all subsequent models of the Bonanza together. Both lower courts found that the changes between the original 35 model and the model involved in the present action were so great as to justify a finding that they were different airplanes. These changes included a considerable increase in the strength of the wings, so great, in fact, that it led to a change in the CAA category for which the plane was certificated which permitted the later models to do some type of acrobatics not permitted to the original model 35.

There are other reasons for excluding the statistics. First, the evidence shows at least three categories of variables to be involved in these accidents including the pilot, the airplane and the flying conditions. Since these variables are not controllable it is impossible to draw any conclusions

as to any one. And second, the statistics are inadmissible because of a statute which prohibits the use of CAA accident reports as evidence in any suit or action for damages growing out of any matter mentioned in the reports. These accident reports are the basis of the statistics. Since it is claimed that these accidents prove and are notice of defective design, this action grows out of matters mentioned in the reports themselves. The underlying data being inadmissible, the statistics themselves cannot be admitted.

## IV.

The decisions below are confined to the facts of the present case, do not adversely affect the rights of other litigants and are not based, implicitly or otherwise, on the findings of an Administrative Agency. Those decisions were based entirely on the conclusive showing of Prashker's contributory negligence and the insufficiency of the evidence of negligence. The lower courts held that fair-minded jurors could not differ on their appraisal of the evidence presented.

Respondents did contend that the CAA and CAB findings should be conclusive, or at the very least presumptive, on the question of respondents' negligence. However, the lower courts did not reach or pass upon that question. There is, therefore, no basis for petitioners' assertion that the lower courts used rulings on evidence as a subterfuge to give effect to the CAA and CAB findings.

## V.

Petitioners have built up this record in the hope that with massive data they will be able somehow to deter a court from taking the case from the jury, and will be able to get the sympathy of a jury by overwhelming it with horror stories of prior accidents. *Even in the Petition for Certiorari Plaintiffs are attempting to impress the court*

*with accounts of accidents which form no part of the record, and have no relationship whatever to the present case.*[4]

The lower courts, after careful examination of the record, have properly found that there was insufficient evidence to justify taking further time of court and jury. In so doing, they have clearly applied the correct legal tests. This court should not spend its valuable time reviewing this record in detail or in considering the narrow questions presented by it.

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4. For example, petitioners refer to accidents which have occurred since the date of the crash. In this connection, we might refer to SA-328, Civil Aeronautics Board Aircraft Accident Report, file No. 2-004, adopted June 26, 1958 and released July 2, 1958. The Board decision concludes:

> "The Board determines that this accident was caused by the pilot's attempt to fly in weather conditions beyond his level of ability."

## E. ARGUMENT.

### I. THE UNANIMOUS DECISION OF THE TWO LOWER COURTS ON THE INSUFFICIENCY OF THE EVIDENCE SHOULD NOT BE REVIEWED BY THIS COURT.

The District Court held that "The minds of men could not differ upon the question that the actions of Prashker directly contributed in some degree to the accident"[5] (297a). In so ruling, the court expressly recognized that, "When the question of contributory negligence arises from a state of facts from which reasonable persons might draw different conclusions either as to the facts or the conclusions or inferences drawn from such facts, the question of contributory negligence is for the jury to determine" (296a). Quite clearly the court felt that fair-minded jurors could not honestly differ upon the question of whether Prashker's negligence contributed in some degree to the accident. It would have been futile, and contrary to accepted judicial principles, to proceed further with the trial when plaintiffs' own evidence had so plainly established that they were not entitled to recover.

The test applied by the District Court is eminently correct whether (in a case such as this where jurisdiction is based solely upon diversity of citizenship) the question of the sufficiency of the evidence for the jury is to be governed by Federal law, see *Byrd v. Blue Ridge Cooperative*, 356 U. S. 525, 78 S. Ct. 893, 2 L. Ed. (2d) 953 (1958) reh. den. 357 U. S. 933, 78 S. Ct. 1366, 2 L. Ed. (2d) 1375 (1958), by the local law of the forum, e.g., *Palmer v. Hoffman*, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943) reh. den. 318 U. S. 799, 63 S. Ct. 757, 87 L. Ed. 1163 (1943); *Cities*

5. It was conceded that Pennsylvania law is applicable to the defense of contributory negligence, and that under Pennsylvania law there can be no recovery if Prashker's negligence contributed in any degree to the production of the injury complained of.

*Service Co. v. Dunlap*, 308 U. S. 208, 60 S. Ct. 201, 84 L. Ed. 196 (1939). The applicable law in all of the jurisdictions involved is in accord with the ruling of the District Court. *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 510, 77 S. Ct. 443, 450-451, 1 L. Ed. (2d) 493 (1957); *Kent v. Parker*, 8 Terry 151, 89 A. (2d) 133 (Del. 1952); *Maher v. Voss*, 9 Terry 45, 98 A. (2d) 499 (Del. 1953); *Antonelli v. Tumolo*, 390 Pa. 68, 132 A. (2d) 285 (1957).

The Court of Appeals took the same view as the District Court, agreeing that the evidence would not support an inference which is vital to petitioners' contentions on the issue of contributory negligence (Pet. 7a). The Court, however, feeling that its position on the availability of such inference "may be arguable" and also because the case had been "so thoroughly and well presented," preferred "to rely *also* on an alternative ground for decision" *that the evidence did not show any negligence on the part of Respondent Beech* (Pet. 7a, emphasis supplied).

The entire issue here rests upon the peculiar facts involved in this case, largely undisputed, and the inferences properly to be drawn from these facts. The District Court following three weeks of the presentation of petitioners' case felt that on the question of contributory negligence the minds of men could not differ upon these facts and upon the conclusions and inferences to be drawn from them. On review of the record, three judges of the Third Circuit Court of Appeals unanimously agreed.

This Court is thus being called upon to review the unanimous findings of two lower courts on the sufficiency of the evidence in a voluminous and highly technical and highly specialized record. This Court is not now being called upon to review the judgment of an Appellate Court which has reversed and set aside a lower court jury verdict and judgment thereon as in the cases relied on by Petitioners: *Union Trust Company v. Eastern Airlines*, 350 U. S. 907, 76 S. Ct. 192, 100 L. Ed. 796 (1955) (Pet. p. 24); *Gibson v. Phillips Petroleum Company*, 352 U. S. 874, 77

S. Ct. 16, 1 L. Ed. (2d) 77 (1956) (Pet. p. 24); *Anderson, Adm'x v. Atlantic Coastline Railway Co.*, 350 U. S. 807, 76 S. Ct. 60, 100 L. Ed. 725 (1955); *Swafford v. Atlantic Coastline R. R. Co.*, 350 U. S. 807, 76 S. Ct. 60, 100 L. Ed. 725 (1955) (Pet. p. 24); *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946) (Pet. pp. 18, 22) and *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1944) (Pet. p. 24). Nor is it called upon to repudiate a rigid judge-made standard of negligence either under Federal statute as in *Jacob v. City of New York*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942) (Pet. p. 18) or under the pre *Erie R. Co. v. Tompkins* federal common law of negligence as in *Pokora v. Wabash Railway Co.*, 292 U. S. 98, 54 S. Ct. 580, 78 L. Ed. 1149 (1934) (Pet. p. 24).

It is, therefore, appropriate to apply the two-court rule in this case. Where two lower courts have agreed that the evidence of negligence or contributory negligence, and the inferences which may properly be drawn therefrom, do not warrant submitting such issues to the jury, this Court will accept those findings in the absence of plain error. *Boehmer v. Pa. R. R. Co.*, 252 U. S. 496, 40 S. Ct. 409, 64 L. Ed. 680 (1920); *Gillis v. N. Y., N. H. & H. R. R. Co.*, 249 U. S. 515, 39 S. Ct. 355, 63 L. Ed. 738 (1919); *Erie Railroad Company v. Welsh*, 242 U. S. 303, 37 S. Ct. 116, 61 L. Ed. 319 (1916); *Baugham v. N. Y., Phila. & Norfolk R. R.*, 241 U. S. 237, 36 S. Ct. 592, 60 L. Ed. 977 (1916).

There is a strong public policy argument in support of the right of a court to direct a verdict for a defendant when the plaintiff has failed to make a prima facie case. The time of the court, the time of the jurors, that of other litigants and the interests of justice all require that a jury should not be obliged to sit through many more weeks of trial when a plaintiff has already demonstrated his inability to establish his case, and a court should not permit a jury to speculate in a case where the plaintiff has made out such a poor showing that, as a matter of law, it may be said that

he is not entitled to recover. Under these circumstances there certainly cannot be any violation of the Seventh Amendment to the United States Constitution.

The lower courts manifestly recognized and applied the proper test in determining whether there was sufficient evidence for the jury. The application by the lower courts of this test to the facts of this case was not plainly erroneous. In fact, the result reached by the lower courts was absolutely inevitable, and the only possible reasonable result under the evidence presented, as we shall now show.

## II. THE DIRECTION OF A VERDICT IN THIS CASE WAS CLEARLY CORRECT.

### A. As to Contributory Negligence (Pet. pp. 15-18)

It is agreed by all parties that Prashker flew his plane into instrument weather in which he was unqualified to fly, lost control of the airplane, and as a result imposed heavy loads upon the wings and tail in excess of the limitations for which the plane was designed, and thus ripped off a wing and part of the tail in flight. Petitioners, realizing the strong evidence of contributory negligence inherent in the entire situation, devoted a good part of their case to an attempt to excuse Prashker's conduct. Their argument postulates hypothetical facts which find no support in the record or in any inferences that can fairly be drawn therefrom.

Prashker's conduct can be measured only in terms of warnings he had received, the Civil Air Regulations, and a knowledge of flying which is completely outside the range of experience of the average juror. The case deals with matters entirely foreign to the average juror's experience, such as aviation vertigo, meteorological data as seen in the air and interpreted by weather reports, blind flying, etc. Unlike a ship, train or automobile case, the juror's common sense will not enable him to draw inferences and conclusions

without considerable help from a pilot or someone of equivalent qualifications who can testify as to conditions in the air. Cf. *Woschenko v. C. Schmidt & Sons*, 2 N. J. 269, 66 A. (2d) 159 (Sup. Ct. 1949).

The only pilot called by the Petitioners was William H. Blakemore, a TWA pilot who was also employed as a salesman by respondent Atlantic Aviation Corporation (38a-39a). In addition to some questions regarding Blakemore's slight connection with the sale of the plane here involved to Prashker (39a-40a), Petitioners' counsel qualified Blakemore as an expert pilot (39a) and questioned him on weather conditions between the two airports involved, in an attempt to establish a basis for justifying Prashker's flight under the conditions shown by the evidence (40a-43a). Blakemore's expert pilot testimony is uncontradicted and provides, in addition to the Civil Air Regulations and Respondent Beech's warnings, the only criteria by which to measure Prashker's conduct.

The evidence, considered in the light of Blakemore's testimony and the Civil Air Regulations, establishes conclusively Prashker's negligence in taking off on the fatal flight, in attempting to fly over the City of Pittsburgh, in not turning back in time, in attempting to climb up into the overcast, and in failing to lower flaps and landing gear after entering the overcast.

Prashker was negligent in taking off in the face of weather conditions which he either had not checked, or had ignored. He knew he was not qualified to fly in instrument weather, and had been warned of the dangers (pp. 9-10 *supra*). Yet the weather report showed an estimated ceiling of 1800 feet, horizontal visibility of 4 miles (304a), haze, light rain, and a temperature close to the dew point (PX 26, 304a). The latter factor gave every reason to anticipate the formation of fog and changing weather conditions (122c). Nevertheless Prashker filed a visual flight rules plan giving an indicated altitude (i.e., altitude above sea level) of 3,000 feet, to which he intended to fly (75a) which

translates to 1,750 feet above the airport (which was 1,250 feet above sea level). The flight plan therefore contemplated flying only 50 feet below the reported ceiling, a clear violation of 14 C. F. R. § 60.30 which requires a non-instrument pilot to stay 500 feet vertically and 2,000 feet horizontally away from an overcast (47a-49a). See *Allen*, 13 CAB Rep. 375.

Although the CAA minimums were slightly exceeded Blakemore's testimony established that there are times when it is unsafe for a non-instrument pilot to take off even though the minimum requirements of ceiling and visibility are met (45a). Prashker was clearly negligent either in failing to check the weather or in taking off in the face of the information furnished. *Hall v. Osell*, 102 Cal. App. (2d) 849, 228 P. (2d) 293, 3 Avi. 17,493 (App. D. C. 1951).

Prashker was further negligent in attempting to fly over the City of Pittsburgh, a city over which in 1953 (the time of the crash) there was considerable smoke and haze (43a). Certainly Prashker, who had gone to college there (21a), who claimed Pittsburgh as his residence (11b) and who had previously piloted his own planes in or out of Pittsburgh several times (113b) was aware of the smoke and haze in the Pittsburgh area (49a). If not, he was specially warned at the outset of this very flight by the Tower: "* * * I advised him to use caution passing through the Greater Pittsburgh area as they have considerable instrument traffic" (PX 26; 310a, 306a). Blakemore testified that in any event a prudent pilot in making up his flight plan would have considered the probability of smoke and smog over the city (45a).

Prashker was supremely negligent in allowing himself to become involved in instrument weather and in trying to climb up into the overcast, instead of keeping under it and returning to the airport, or otherwise avoiding it. The Incident Report shows that when Prashker established radio contact with his own airport he was "already in the G—D— stuff" and "was climbing to get on top" (310a). This was

clearly a violation of several Civil Air Regulations: 14 C. F. R. § 43.65 (which prohibits instrument flight by a pilot who does not have an instrument rating, see *Carver*, 13 CAB Rep. 277 and *Konantz*, 13 CAB Rep. 401); 14 C. F. R. § 43.68 (which requires instrument training within the previous six months); and § 60.30 (requiring a non-instrument pilot to stay 500 feet vertically and 2,000 feet horizontally away from an overcast). Blakemore testified that it would be not only a violation of the regulations [6] but that it would be imprudent for a pilot to attempt to climb into an overcast where he does not have an instrument rating (47a-49a).[7]

Finally, Prashker neglected to lower landing gear and flaps (21c, 22c), as he had been advised by respondent Beech to do if he found himself in weather conditions with which he could not cope (25b-27b). He further heightened the danger by having his plane trimmed for a slightly nose down attitude (76b-77b).

It cannot be disputed that the violation of a specific regulation or statute controlling aviation constitutes negli-

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6. Cf. 14 C. F. R. § 60.12 which prohibits a careless or reckless operation of an aircraft and sets forth as an example of a violation "an operation conducted above a cloud layer in accordance with VFR minimums which results in a pilot becoming involved in instrument flight, unless the pilot possesses a valid instrument rating, the aircraft is equipped properly for instrument flight and all IFR requirements are observed". Prashker was attempting to conduct such an operation by climbing up through the cloud layer. See also *Hartshorn*, 13 CAB Rep. 410.

7. The absurd proposition which was advanced by petitioners for the first time before the Court of Appeals to the effect that the reason Prashker climbed up into the overcast was to get as much space as possible between himself and the ground (Pet. p. 17) is totally unsupported by a shred of evidence anywhere in the record. Petitioners would not have dared to have any witness testify to this ridiculous suggestion in the court below where it could have been exposed on cross-examination. It is hopelessly inconsistent with petitioners' other contention, that Prashker was trying to return to the airport. The only pilot expert called by petitioners described Prashker's conduct as imprudent (47a-49a).

gence *per se* and bars recovery under Pennsylvania law. See *Yoffee v. Pennsylvania Power & Light Company*, 385 Pa. 520, 123 A. (2d) 636 (Sup. Ct. 1956); *T. A. T. Flying Service v. Adamson*, 47 Ga. App. 108, 169 S.E. 851 (Ct. App. 1933); 2 C. J. S. *Aerial Navigation*, § 21.[8]

Petitioners rely upon a presumption of due care. The Pennsylvania decisions clearly hold that the presumption is not applicable where, as here, plaintiffs' own evidence establishes decedent's negligence. *DeFonde v. Keystone Valley Coal Co.*, 386 Pa. 433, 126 A. (2d) 439 (Sup. Ct. 1956); *Zotter v. Lehigh Valley R. R. Co.*, 280 Pa. 14, 124 Atl. 284 (Sup. Ct. 1924); *Rank v. Metropolitan Edison Co.*, 370 Pa. 107, 87 A. (2d) 198 (Sup. Ct. 1952).

The suggestion of Petitioners that after take off Prashker encountered worsening conditions, turned back, and in attempting to return found himself trapped in bad weather (Pet. pp. 16-17) is directly contrary to the evidence and to any inferences or conclusions which may be drawn therefrom. The evidence clearly is to the effect that the instrument weather could have been avoided.

Even if Prashker did turn around, it is clear that he imprudently allowed himself to go too far before doing so. Blakemore's testimony, uncontradicted, establishes that Prashker would have been able to see the instrument weather in time to take means to avoid becoming involved in it (45a-46a, 69b-70b). When petitioners' counsel attempted to discredit this testimony by suggesting to Blakemore that he knew from his own experience that weather can close in on a pilot, Blakemore denied it, and under further questioning stated that he knew of no responsible evidence that weather could close in on a pilot. Blakemore's testimony was consistently to the effect that the pilot can and must avoid the weather conditions either by

8. Cases dealing with whether the conduct of the pilot was sufficiently gross so that his license should be removed or suspended are inapposite.

turning around, by flying under it or by flying around it (48a-50a, 54a-57a).

Blakemore's testimony is further supported by the weather reports, which establish that the weather at the airport was VFR throughout the flight (304a). And Prashker got into trouble over the Greater Pittsburgh area after he was specifically warned, at take off, about "* * * the Greater Pittsburgh area as they have considerable instrument traffic" (PX 26; 306a, 310a). He cannot complain of a trap, or claim emergency, since the situation, especially in view of the warning, was of his own making.

The District Court was, therefore, amply justified in holding that, "It is the undisputed evidence in the case that instrument conditions or instrument weather do not suddenly come upon one but that such conditions can be avoided by either going to one side of such conditions or returning from whence he came" (297a). This was the testimony of petitioners' only pilot expert. Therefore, the Court of Appeals was amply justified in its holding that an inference that bad weather may have closed in on Prashker even though he was exercising due care for his own safety was not available.[9]

The rulings of the courts below were correct. *A fortiori* these rulings certainly were not such a plain error as would justify this Court to ignore the two-court rule to grant certiorari on this narrow question.

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9. Petitioners ask, "How can the question of contributory negligence be arguable and still not be left for the jury?" (Pet. p. 16.) It was the availability of the inference that weather can close in on a pilot which the court stated "may be arguable". The court "inclined to the view" that the inference was not available and, therefore sustained the ruling of the District Court. The court did not say the question of contributory negligence was arguable. It was not.

## B. As to Negligence.

### 1. Alleged Negligent Design (Pet. pp. 22-24).

The evidence relating to plaintiffs' contentions of negligent design must be thoroughly distorted before the court could come to the conclusion that fair-minded jurors might find that the plane was negligently designed. In fact the Petition for Certiorari is full of such distortions.

The Petition for Certiorari alleges a combination of three characteristics which it is claimed made the Bonanza peculiarly subject to be torn apart by an unwary pilot (pp. 5, 22-23). These three alleged characteristics are: (1) an oscillation characteristic which allegedly would disorient a pilot and make him physically ill (vertigo), (2) alleged light stick forces, and (3) an alleged extremely rapid rate of speed build up in a nose down attitude. There is no evidence whatsoever in the record which can reasonably be said to support factors 1 and 2. As to factor 3, it is admitted that the Bonanza is a high performance airplane of clean design which builds up speed rapidly in a dive. We show *infra* (pp. 32-33) that Prashker was aware of this and that Beech specifically warned him of it. There is no evidence that this characteristic was extreme for an airplane of clean design.

Petitioners failed to produce a competent expert who could establish that the oscillations would produce vertigo, and produced no evidence whatsoever to show that these particular oscillations were more likely to produce vertigo than oscillations which occur in other airplanes.

The testimony of the physiologist produced by petitioners related solely to motions in a barany chair. However, it was agreed that the airplane's oscillations, unlike the barany chair movements testified to, were not more than two or three degrees on either side of a node (46c-47c, 135c-136c). This fact was not even propounded by petitioners to their expert (164c-165c), nor did this expert feel the plaintiffs had asked for an opinion relating to this type

of oscillation (164c). Plaintiffs' expert candidly conceded that he did not know anything about airplanes or whether or not the barany chair tests (he had only observed them 25 years before as a student in medical school) fitted the motions of an airplane (155c-165c).[10] *Indeed this expert testified that short back and forth oscillations such as it was conceded existed in this airplane would tend to negate each other and eliminate any trace of vertigo* (165c).

If we assume, contrary to fact, that the oscillations of the tail of this plane have vertigo-inducing characteristics in instrument conditions, petitioners have nevertheless failed to adduce any evidence that these characteristics were peculiar to the Bonanza. All airplanes have the[re] oscillations to some degree (132c). The fact that the evidence shows that all aircraft do not have precisely the same oscillation characteristics, or pitch to precisely the same degree, provides no basis for drawing adverse inferences as to the Bonanza, or for assuming that vertigo is more likely to occur in the Bonanza than in any other plane.

The undisputed evidence shows that Prashker was aware of the oscillations even before he bought the airplane (47b-48b), that he discussed them with his brother after the purchase (51b), that these oscillations occur only in certain types of rough air (46c, see 50b) and do not affect the stability of the airplane (47c). The National Advisory Committee for Aeronautics which made extensive tests of the Bonanza model and observed the oscillations, nevertheless found the plane to be satisfactory and not unsafe (52c). The CAA, after examining the longitudinal, directional and lateral stability of the Bonanzas, found no unsafe feature since it concluded that there was no need to revoke the type certificate (32c-33c).

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10. Assuredly plaintiffs were not prevented from engaging somebody especially competent in the field of aviation medicine. There are such experts (159c). Obviously the expert picked by plaintiffs was not competent in this field, and did not pretend to be able to give an opinion as to the effect of airplane oscillations on vertigo (155c-161c, 163c).

Petitioners' only expert on the subject of vertigo was unable to state that the oscillation characteristics of the Bonanza would produce vertigo (163c) and was clearly in no position to compare them with other airplanes. He agreed that vertigo is likely to ensue in any event where a person unfitted for instrument flying is placed in a situation where he must use an instrument to fly (163c). The absence of satisfactory expert testimony leaves the jury with no basis for finding that the oscillations had any tendency, let alone a special tendency to induce vertigo, cf. *Woschenko v. C. Schmidt & Sons*, 2 N. J. 269, 66 A. (2d) 159 (Sup. Ct. 1949).

As to the stick forces, there is no testimony whatsoever that they were in any way a contributing factor in this accident. The Petition for Certiorari does not even cite a record reference. Even Mr. Dommasch, one of plaintiff's experts, did not attempt to link the stick forces to this accident.

The only evidence in the record shows that the Bonanza had stick forces higher than any existing specifications. The stick forces per G are above those required by the National Advisory Committee for Aeronautics, a permanent governmental research organization (55c-56c, 59c-60c) and exceed both the maximum and the minimum required by the military (59c).[11] Actually the plane in the present case was loaded in a way that would have made the stick forces even heavier (57c).[12] The CAA after investigating the stick forces per G, made no decision to revoke the type certificate (31c).

As to nose down acceleration, there is no evidence that once the plane was in a nose down attitude its acceleration

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11. The suggestion in the Petition for Certiorari (p. 22) that the Bonanza would pick up speed more rapidly than a military fighting plane is astonishing. It is certainly not supported by the record.

12. Petitioners' reference to the disastrous effects of "a light touch on the stick" (p. 5) is wholly unsupported by record references, and contrary to the testimony as references above made show.

was greater than could have been expected of any high performance airplane of clean design. The CAA found no dangerous nose down tendencies in this airplane (28c-29c), and it is undisputed that the airplane does not get into a nose down attitude unless it is pushed there (51c). It is also undisputed that no plane could be certificated by the CAA if it had dangerous tendencies to get into a nose down position (40c).

The documents alluded to by petitioners (Pet. pp. 20 and 21) do not establish or tend to establish anything to the contrary. The excerpt (Pet. p. 23) from the NACA report (PX 22) is a statement that might well be made about any airplane with a clean design. In fact, that report concluded that the airplane was a satisfactory airplane (see 52c). PX 42 is one of many such reports prepared by Beech (221a) and attempts to give actual figures of the nose down acceleration of the Bonanza. These figures were later disproved (218a), and petitioners' counsel demonstrated through his examination of one of Beech's engineers that the figures included in that report were impossible in that they ran counter to physical laws and were an error which Beech had overlooked (219a-221a). It is difficult to see how these admittedly erroneous and impossible figures can possibly be used as the basis for a finding of fact. PX 72 is a report submitted by employees of respondent Beech dealing with the feasibility of dive brakes.[13] Again there is nothing in this report which would indicate that the acceleration in a

13. A contention that the plane should have had dive brakes was alluded to at the trial and was mentioned in the opinion of the Court of Appeals (Pet. 8a). The only evidence on this point was to the effect that the CAB never required dive brakes (29c), that the landing gear itself could be used as a dive brake (130c), that dive brakes were explored by Beech's personnel who concluded that they would be undesirable from a safety standpoint (223a, 225a-226a; PX 22) and that they have never been used in airplanes like the Bonanzas, but only on military planes (129c-130c). Of course, the mere investigation of a possible safety feature does not demonstrate or provide evidence of its desirability.

nose down position arises from any fact other than the plane is a high performance airplane of clean design.

The reference to a rapid nose down pitch and build up of speed associated with it (Pet. p. 23) is just another example of grasping for straws. There was no testimony that this alleged characteristic was a factor in the accident. It was mentioned in an oblique way only on cross-examination, and petitioners did not even consider it of sufficient importance to include it in their printed appendices for the Court of Appeals.

This accident occurred because an unqualified pilot attempted to fly in instrument weather. Admittedly his danger was increased by the fact that the airplane was clean and could pick up speed rapidly. However (as the Court of Appeals pointed out) in view of the warnings given Prashker (*supra* pp. 9-10; *infra* pp. 32-33) he assumed the risk of this characteristic every time he flew subject to the possibility that he might encounter turbulent instrument conditions.

**2. Alleged Failure to Warn (Pet. pp. 19-22).**

The evidence establishes conclusively that Beech warned Prashker of the dangers of flight (of which every pilot is aware anyway) and that Beech specifically and repeatedly warned him of the very danger which led to this tragic accident, namely the danger of flight under instrument conditions by a pilot not qualified to fly on instruments. Decedent was specifically warned that cleanness of design permits rapid acceleration.

PX 6, entitled "Facts Every Aircraft Owner Should Know" (13b), was admittedly sent to Prashker by Beech and read by Prashker (15b). That booklet specifically warned of the difficulty of anticipating the extent of turbulence in an area of obscure visibility. The booklet stated that the most common difficulty experienced was for the airplane to get into a dive and that the rapidity with which

the hazard increases is more pronounced as the cleanness of the airplane increases (17b). Prashker was aware that the Bonanza was a clean airplane (17b).

PX 13, a booklet entitled "Air Facts" (14b) and furnished to Prashker by Beech (33b), in discussing the dangers of an unqualified pilot getting into instrument conditions, points out: "Since a modern, clean airplane will pick up speed very quickly without the nose being pushed down very far, the situation rapidly gets out of hand" (PX 13 p. 6, found at 168c; 36b).

PX 17, the Beechcraft Bonanza 1953 handbook (15b), admittedly furnished to Prashker by Beech and read by him (41b) states, "The loads which rough air or turbulence can put on a wing at higher speeds is something that must be borne in mind at all times. These problems apply to all aerodynamically-clean airplanes of which the Bonanza is one" (41b-42b). The exhibit further states, "Aerodynamically-clean airplanes will pick up speed rapidly when the nose is dropped . . ." (42b).

Prashker's own brother testified that Prashker was aware that the Bonanza was a clean airplane which would accelerate rapidly in a nose down position, and that Prashker had read and absorbed the warnings of Beech on this point (17b, 34b-35b, 36b-39b). These warnings were a part of the over-all warnings by Beech that pilots unqualified to fly instruments must avoid instrument weather (13b-25b, 29b-38b; see PX 6, 7, 8, 13, 17 and 18).

The warning was specific and undisputed. There is no evidence on which to submit the issue of failure to warn to the jury.

## III. EVIDENCE OF PRIOR ACCIDENTS AND STATISTICS WAS PROPERLY EXCLUDED AS IRRELEVANT, AS WELL AS ON OTHER GROUNDS, AND WOULD HAVE ADDED NOTHING TO PETITIONERS' CASE.

### A. As to Prior Accidents.

The evidence of the prior accidents could not in any way have changed the ruling as to Prashker's contributory negligence, which the lower Courts found dispositive of the case. Nor could it have added anything to the petitioners' attempted proof of negligent design.

Although petitioners' aerodynamicist[14] testified that he needed the reports to enable him to form an opinion, it is quite apparent from his testimony that all he was able to wring out of these reports was an alleged pattern of a disoriented pilot who, as a result of his disorientation, allowed the nose to drop and the plane to pick up excessive speed, pulling the wings off when he tried to pull out of the dive (248a-251a). As we have already shown in our Statement of Facts, this is undoubtedly a situation of common occurrence in any airplane where a pilot who is not qualified to fly on instruments negligently gets into instrument conditions (pp. 7-8, *supra*). Loss of control naturally may ensue more rapidly in a "clean" airplane (pp. 8-9, *supra*). In fact, this is specifically pointed out in the article "G's" in "Air Facts" for December 1, 1948 (PX 13, p. 6 at 168c), a copy of which was furnished by Beech to every Bonanza purchaser, including Prashker. The evidence of these accidents would therefore add nothing to petitioners' proof. Nevertheless, the lower Court did permit petitioners

14. Petitioners' glowing references to their expert, Dommasch, should be read in the light of what the record actually shows: Dommasch was not a pilot (60c); he ordered no flight tests of any Bonanza (74c); he had never flown in any model Bonanza (60c); he had never done any accident investigation, except for one helicopter accident (64c-65c).

to introduce several such reports for the purpose of attempting to establish notice.

In point of fact, the Court properly excluded the balance of the reports of prior accidents on the ground of irrelevancy. The Court of Appeals succinctly and ably set forth the proper basis for this ruling when it said (Pet. 11a-12a; 258 F. 2d 602 at 608-609):

> "Showing that the planes came apart is not enough because of the compromise required with structural strength in designing an aircraft which will get off the ground. To be relevant on the issue of causation attributable to a design defect the accident reports would have had to show at least that the planes involved had not gone out of control prior to their coming apart, or if they had gone out of control that it had been without the fault of the pilot. The seven reports in evidence—and they may be assumed best to present the plaintiffs' case—invariably involve pilots unqualified to fly under instrument conditions who nonetheless were in such conditions or, in a few instances involving the unadmitted reports, pilots qualified for instrument flight who were in turbulent weather when the accidents occurred. To hold the aircraft responsible on such evidence would be utterly to disregard the factor of human fallibility known inevitably to occur in such circumstances and would be patently unjustified."

Petitioners complain of failure to follow local law. The only local law applicable is that of Delaware, since Rule 43, F. R. C. P. provides that either Federal Law, or the law of the forum applies, whichever one favors reception of the evidence. Delaware law is presumably the same as Federal Law, which requires that the evidence of the prior accidents have some probative merit. The opinion of the Court of Appeals persuasively exposes the lack of such probative merit in this case.

The words "prior accidents", "existence of a dangerous condition" and "causation" do not in themselves have a talismanic effect to open the door to the admission of prior accidents.[15] The occurrence of the prior accidents must be shown to have a tendency to prove notice or the existence of a dangerous condition. The cases cited by petitioners, including the Pennsylvania cases, involve an object which is surrounded by a few clearly invariable or similar circumstances, and involve accidents which ordinarily would not be expected to happen in their setting. Unlike the present case, they do not involve the maneuvering of a delicate mechanism, which requires a high degree of skill and care. Here the unqualified pilot, regardless of the airplane's design or type, can be expected to tear the plane apart if he gets into instrument conditions.

No impartial person could read the prior accident reports and feel that they gave notice of any design defect in the plane. Thus PX 51 relates to a pilot with no instrument rating. PX 52 relates to a pilot who notwithstanding an instrument rating had been adjudged so poor a flyer on instruments that his superior had forbidden him to fly in instrument weather (107c-108c). PX 49 suggests that the pilot was reckless (106c). PX 46 (95c-97c) indicates a violent storm and PX 47 a dangerous thunderhead (100c-101c), dangerous even to a qualified and experienced pilot. PX 48 indicates turbulence and thunderstorm (102c) and PX 52 indicates heavy rain and lightning. PX 47 suggests that the plane may have been improperly maintained and previously damaged (100c), and that the plane was doing "barrel rolls" (99c). The plane in PX 49 did not have adequate instruments for instrument flying (104c-105c).

Virtually every accident plaintiffs offered to prove (260a) occurred under adverse weather conditions where

15. Petitioners' statements, p. 26, complacently arrogating to themselves the triumph of being the first to "pin-point the design of the airplane" as the cause of these accidents should be read in the light of the fact that they have not done so. The testimony showed that the decedent himself was responsible for this accident.

the plane was flown into instrument conditions. Yet of the Beecheraft Bonanza accidents preceding the one in suit (not one of which involved a Model D), in only two instances was the plane known to be piloted by a pilot with an instrument rating and equipped with the proper instruments for flying in instrument weather. Both involved flight into a thunderstorm with moderate to heavy turbulence reported, a danger for any pilot (101c). These reports are no more evidence of notice to the manufacturer of negligence in design or construction than a crash of an automobile is notice to the manufacturer of that vehicle that he has fallen down in some respect.

Dommasch's testimony that the reports were necessary to his analysis carries no weight, for all he could get out of them was some vague kind of notice of "a set of circumstances that could get a pilot into very serious trouble" (251a). Mr. Dommasch also testified that one of the reports (PX 46) which consisted wholly of foreign newspaper clippings was so unreliable that he put "no particular stock in it" (148c), that he did not know that the only instrument pilot in any of these reports (PX 52) had been grounded for incompetence (149c-150c), that he did not recall the testimony indicating that the plane in PX 52 may have been flown into instrument conditions by a student pilot (150c) and that in the remaining five reports in every instance a non-instrument pilot was involved in instrument conditions (155c). The lengths to which Dommasch would go to torture some kind of "notice" out of these reports is dramatized at 265a where notwithstanding the grossest evidence of a pilot's negligence the witness still endeavors to locate other reasons for the crash.

The Court of Appeals also upheld the rulings as to prior accidents as those rulings related to the original model 35 airplane. The Court of Appeals upheld the Court's finding that the changes made between the original model 35 and the D model involved in the present case were

sufficiently great to justify regarding the two models as dissimilar aircraft. This ruling was clearly supported by the record.[16] We do not labor the point as petitioners have not mentioned it in their Petition for Certiorari.

The District Court was also clearly justified in exercising its discretion to limit the number of prior accidents that could be introduced. The exercise of discretion was based upon a consideration of the extent that collateral issues may be introduced, the degree of prejudice that might result and the amount of time to be expended. See *Dimenco v. Pa. R. R. Co.*, 19 F. R. D. 499 (D. C. Del. 1956). No abuse of that discretion is shown in this case.

**B. As to Statistics.**

Like the evidence of the prior accidents, evidence of the statistics could not in any way change the ruling as to Prashker's contributory negligence, which the lower Courts found dispositive of the case.

Similarly, evidence of the statistics could not have added anything to change the result of petitioners' attempted proof of negligent design. The statistics themselves do not prove bad design any more than a racing car could be shown to be badly designed merely by comparing its accident rate with that of all other cars. We have already shown (*supra* pp. 30-32) that the clean design which admittedly increases in some respects the need for care in instrument weather, cannot form the basis for liability in this case.

The proposed statistical comparison has no factual basis or merit. Petitioners seek to lump together all models

16. When petitioners state, p. 5, that this action "arises out of the 46th almost identical instance of structural failure in the flight of a Bonanza," it should be kept in mind that in every other accident: (1) a different model Bonanza with a different strength was involved; (2) a different pilot was involved; (3) the weather conditions differed; (4) the other surrounding circumstances differed.

of the Bonanza, and to lump together all other single-engine civil airplanes, regardless of clean design or intended use (Pet. p. 14), and to make an over-all comparison.

By comparing the Bonanza, which is used considerably in cross-country flight involving varied weather conditions, with a plane such as the Piper Cub, which almost invariably remains close to the airport and rarely, if ever, encounters instrument weather, petitioners are offering a distorted and meaningless picture. It is like comparing ice boats with sail boats, and saying that ice boats are safer because no ice boat ever overturned in a tropical hurricane.

Furthermore, the changes between the original 35 model, and the D model here involved were, as the Court of Appeals has pointed out in its opinion (Pet. 11a), sufficiently substantial to justify treating the original model and the airplane involved in the present crash as dissimilar airplanes. It is undisputed that these changes involved first an increase in the limit design load factor from 3.8g's to 4.4g's which moved the planes from the CAA's normal category to the utility category for certification purposes, and increased gross weight. This improved the structural strength of the airplane, permitting it to do some types of aerobatics not permitted the original model. The second significant change was to the dihedral and area of the tail which affected the plane's handling characteristics.

If the original model 35 is removed from these statistics, and the same comparison made only for the A, B, C and D models, the figures change drastically in the Bonanza's favor. When separated out, the original model 35 still compares favorably with the Cessna models 190 and 195, airplanes of comparable design, and has a more favorable rate than five other models of airplanes. And the A, B, C and D models show rates which put them approximately in the middle. The plane involved in this case, as noted above, was a model D.

The reason given by the Court of Appeals for excluding these statistics is in any event conclusive. As the Court

pointed out, the statistics tend to prove nothing more than the individual accident reports, and it is extremely dubious whether statistics involving probabilities have any significance when applied to a particular incident (Pet. p. 12a). Any expert who would testify on the statistics in this case would have to concede that structural failure in flight accidents are the product of at least three categories of variables, each of which could be subdivided into many subheadings. These categories are:

(a) The pilot, including his experience, his emotional and physical reactions and his abilities.

(b) The airplane, including the factors which make it difficult or easy to fly, its strength and its maintenance.

(c) The whole complex of flying conditions, including particularly the weather involved and whether or not the area flown over is difficult.

Of course, in order to assign any blame to the airplane arising from statistics of accidents, it would be necessary to control the other two variables. The CAA figures do not and, of course, cannot control any of these variables; hence any statistical result is meaningless.

There is one additional special objection to the admissibility of these statistics. The statistics are predicated upon reports of the CAB. 49 U. S. C. § 581 provides that:

". . . no part of any report or reports of the former Air Safety Board or the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports".

Since it is claimed that these accidents prove and are notice of defective design, the action grows out of matters mentioned in the reports themselves. This statute in itself

would prohibit the admission of the reports which constitute the underlying data for the statistics. The underlying data being inadmissible, the statistics which constitute a summary of that underlying data are similarly inadmissible.

For the foregoing reasons the statistics were properly excluded. In any event they failed to supply the proof that is missing as to plaintiffs' claim of negligence and cannot affect the court's ruling as to contributory negligence.

## IV. THE DECISION BELOW IS CONFINED TO THE FACTS OF THE PRESENT CASE, DOES NOT ADVERSELY AFFECT THE RIGHTS OF OTHER LITIGANTS AND IS NOT BASED UPON THE FINDINGS OF AN ADMINISTRATIVE AGENCY.

The primary basis of the decisions of the lower courts was the contributory negligence of Prashker as shown by the facts peculiar to this case. There is no reason why litigants who are bringing suits based upon different facts and in entirely different actions should be adversely affected, particularly in those cases which involve application of the law of comparative negligence.[17] Of course, the argument that plaintiffs in other cases will not be able to recover unless they can rely on improper or irrelevant evidence should not move this Court to permit these petitioners to rely on improper or irrelevant evidence.

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17. This Court may be interested to know that the pending cases referred to on page 26 of the Petition should be regarded as a group, and not as the separate contentions of numerous lawyers. One or both of the attorneys for the Petitioners in this case is involved in every one of those cases, either officially or unofficially, with the exception of the Weissman case. Weissman was a passenger in the Prashker plane, and his estate being unable to get service on Prashker's Estate in Delaware, in the action referred to by Petitioners in which that Estate is a named defendant, has sued Prashker's Estate in Pittsburgh on the theory that Prashker's negligence was the cause of this crash, and has recovered a very substantial verdict. In the Cleminshaw case, although neither of these attorneys are of record, Mr. Kreindler has taken depositions for the plaintiff, and we are advised he will try the case if it is tried.

As to negligence, the Court of Appeals merely held that the proof was insufficient and did not establish any negligent design or failure to warn. Of course if other litigants make a similar contention and fail to produce evidence other than that produced by the present petitioners, their case will fail, but it will fail for lack of proof, and not because of limitations imposed by this case.

Petitioners' argument that the decision of the Courts below was based upon findings of the CAA is entirely unsupported. Their suggestion that the Courts below used evidence rulings as a subterfuge is a gratuitous insult to a very fine District Court Judge and to the three judges of the Third Circuit who unanimously affirmed his decision. It is true that we took the position in the Courts below that Congress had given to the CAA and the CAB exclusive control over the design of airplanes flown in the United States, and that to permit a jury to overrule the findings of those agencies on airplane design would produce chaos and be contrary to the purposes of the Civil Aeronautics Act. We also argued that the certification established a presumption of due care which could not be overcome on the basis of the obscure and contradictory testimony phrased in indefinite and speculative terms by men who had never flown an airplane or witnessed a flight test of this type of airplane (74c, 72c, 160a). We do not agree that acceptance by the lower Courts of either of these contentions would have been to invite quick reversal by this court, but we do not elaborate this point here as it clearly formed no part of the decisions below. Nor can we agree that the Court of Appeals "expressed great interest in this proposition in its questions to counsel on the argument below" (Pet. p. 26). Of course, if certiorari were granted, we would again urge these arguments as a further ground for sustaining the judgments of the courts below.

The Court should not grant certiorari to review a question not presented by the record.

## F. CONCLUSION.

The whole tone of the Petition for Certiorari is shrill and strident. In a desperate attempt to overcome the lower Courts' decisions which have seen through the insubstantiality and insufficiency of the vast amount of materials presented by the petitioners, petitioners have relied heavily upon extra legal reasons and facts not included in the record. Their arguments include unjustified innuendos about the lower Court judges.

Petitioners have built up this record in the hope that with massive data they will be able somehow to deter a court from taking the case from the jury and will be able to get the sympathy of the jury by overwhelming it with horror stories of prior accidents. Even now they are seeking to impress this court with slanted accounts of accidents, the circumstances of which form no part of the record.

Both lower Courts after a careful examination of the record have properly found that there was insufficient evidence to justify taking further time of court and jury. In so doing they have clearly applied the correct legal tests. This court should not spend its valuable time reviewing this record in detail and the numerous narrow questions presented by it.

The Petition for Certiorari should be denied.

Respectfully submitted,

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